

(25,993)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. 1163.

THE NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

DULUTH ELEVATOR COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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STATE OF MINNESOTA,
Supreme Court, ss:

I. A. Caswell, Clerk of the Supreme Court of the State of Minnesota, do hereby, in obedience to the Writ of Error herein issued, do hereby and return to the Supreme Court of the United States that foregoing and annexed transcript of record is a full and complete transcript of the record, judgment, judgment roll and all of proceedings had in said Supreme Court of the State of Minnesota in the case between Duluth Elevator Co., Respondent, and Northern Pacific Railway Company, Appellant, including the opinion of said Supreme Court filed upon the hearing in which the judgment herein rendered.

do further certify and return herewith a complete return made in this court by the Clerk of the District Court of Ramsey County, Minnesota, in which said cause originated.

also return herewith the original petition for Writ of Error, original Assignments of Error, copy of Bond, Writ of Error, original return and praecipe for transcript of the same.

further certify that the foregoing constitutes a true, full and complete return of said Writ of Error.

Witness Whereof I have hereunto set my hand and the seal of said Supreme Court of the State of Minnesota at the Capitol, St. Paul, Minnesota, this 15th day of May, 1917.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court, State of Minnesota.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

DULUTH ELEVATOR COMPANY, a Corporation, Plaintiff,

VS.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Summons.

State of Minnesota to the above named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above entitled action, which is hereto attached and herewith served upon you, and to serve a copy of your answer to the said complaint upon the subscriber at his office at Rooms 1601-2 Pioneer Building, in the City of St. Paul,
1—1163

County of Ramsey and State of Minnesota, within twenty (20) days from and after the date of the service of this summons upon you, exclusive of the day of such service; and if you shall fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the Court for the relief prayed for and demanded in said complaint, viz., judgment in the principal sum of one hundred nineteen and 64/100 dollars (\$119.64), with interest thereon:

\$21.42 from August 10, 1912;

\$16.10 from August 9, 1912;

\$15.64 from October 1, 1912;

\$16.47 from October 26, 1912;

\$14.09 from March 11, 1913;

\$12.94 from July 31, 1912;

\$10.40 from August 3, 1912;

\$12.58 from October 22, 1912;

and for its costs and disbursements herein.

Dated at St. Paul, Minnesota, this 6th day of January, A. D. 1917.

ERNEST E. WATSON,

Attorney for Plaintiff.

1601-2 Pioneer Building, St. Paul, Minnesota.

3 STATE OF MINNESOTA,
 County of Ramsey:

District Court, Second Judicial District.

DULUTH ELEVATOR COMPANY, a Corporation, Plaintiff,

VS.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Complaint.

The plaintiff for its complaint against the defendant in the above entitled action, avers and alleges as follows:

1.

That at the times hereinafter mentioned the plaintiff was and is a corporation duly organized under and by virtue of the laws of the State of Minnesota, with principal place of business at Minneapolis, Minnesota.

2.

That at the times hereinafter mentioned the defendant was and now is a corporation duly organized and existing under and by virtue of the laws of the States of Minnesota and Wisconsin, and was and is a common carrier of goods for hire between places in the state of Minnesota and more particularly between the places hereinafter mentioned.

3.

That at the times hereinafter mentioned said defendant owned, operated and used two lines of railroad between Duluth, Minnesota, and Hawley, Minnesota, for the transportation of hard coal and soft coal, in carloads, viz: (1) one line (hereinafter called the "State Line"), approximately 241 miles in length, extending in a southwesterly direction from Duluth, Minnesota, to Carlton, Minnesota, thence in a westerly direction to Hawley, Minnesota, all of said line being wholly within the State of Minnesota; (2) another line (hereinafter called the "Interstate Line"), approximately 248 miles in length, extending in a southeasterly direction from Duluth, Minnesota, to West Duluth Junction, Minnesota, thence to Superior, Wisconsin, thence through Wrenshall, Minnesota, to Carlton, Minnesota, thence in a westerly direction, to Hawley, Minnesota.

4.

That under Chapter 232, Laws of Minnesota for 1907, the maximum rate per net ton which defendant could lawfully exact, demand, charge and receive for the transportation of soft coal, in carloads, from Duluth, Minnesota, to Hawley, Minnesota, via the said "State Line" during the period from June 1, 1907, to January 1, 1914, was \$1.34; and for the transportation of hard coal, in carloads, from Duluth, Minnesota, to Hawley, Minnesota, via the said "State Line" during said period was \$1.68; that under the defendant's published tariff on file with the Interstate Commerce Commission, defendant's rate from Duluth, Minnesota, to Hawley, Minnesota, via the said "Interstate Line" was \$2.00 per net ton on soft coal, and \$2.10 per net ton on hard coal.

5.

That on or about the respective dates set forth in Exhibit "A," which is hereto attached and made part of plaintiff's complaint herein, the plaintiff delivered to the defendant at Duluth, Minnesota, the shipments of soft coal and hard coal set forth in said Exhibit "A," the same being loaded in the cars respectively set forth in said Exhibit "A," to be transported to Hawley, Minnesota; that the several shipments weighed the pounds respectively as set forth in said Exhibit "A"; that the defendant accepted the said shipments to be transported as aforesaid, and thereon it became defendant's duty to transport the same via its line of railroad over which the lowest freight rate obtained.

6.

That the defendant transported said shipments as alleged in Paragraph 5, via the said "Interstate Line," and for its services exacted, demanded and received from plaintiff the rate of \$2.00 per net ton on the soft coal, aggregating the sum of two hundred fifty-three and 100 dollars (\$253.70), and the rate of \$2.10 per net ton on the

hard coal, aggregating the sum of one hundred seventy-nine and 56/100 dollars (\$179.56); instead of transporting the said shipments via the said "State Line," which it was defendant's duty to do, and which would have entitled the defendant to have demanded and have received from the plaintiff the rate of \$1.34 per net ton on the soft coal, aggregating the sum of one hundred sixty-nine and 98/100 dollars (\$169.98), and the rate of \$1.68 per net ton on the hard coal, aggregating the sum of one hundred forty-three and 64/100 dollars (\$143.64); that by reason thereof the plaintiff was injured and damaged in the sum of eighty-three and 72/100 dollars (\$83.72) on the shipments of soft coal, as set forth in said Exhibit "A," and thirty-five and 92/100 dollars (\$35.92) on the shipments of hard coal, as set forth in said Exhibit "A," together with interest on each of the respective amounts as set forth in said Exhibit "A" from the respective dates of the payment thereof as set forth in said Exhibit "A," at six per cent per annum.

Wherefore, the plaintiff demands judgment against the defendant in the principal sum of one hundred nineteen and 64/100 dollars (\$119.64), with interest on:

- \$21.42 from August 10, 1912;
- \$16.10 from August 9, 1912;
- \$15.64 from October 1, 1912;
- \$16.47 from October 26, 1912;
- \$14.09 from March 11, 1913;
- \$12.94 from July 31, 1912;
- \$10.40 from August 3, 1912;
- \$12.58 from October 22, 1912;

and for its costs and disbursements herein.

ERNEST E. WATSON,
Attorney for Plaintiff.

1601-2 Pioneer Building, St. Paul, Minnesota.

Filed Jan. 17, 1917. N. C. Robinson, Clerk, by G. A. Johnson,
Deputy.

7 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

DULUTH ELEVATOR COMPANY, a Corporation, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Answer.

The defendant for answer to the complaint avers:

I.

It admits all of the allegations of the complaint except:

(a) It denies that on receipt of the coal referred to in the complaint it became the duty of this defendant to transport the same in any other manner than as the same was transported as hereinafter set forth.

(b) It denies that as a consequence of any of the matters or things set forth in the complaint the plaintiff suffered damage in any sum whatsoever.

II.

Further answering and for a separate defense to the complaint, this defendant alleges that between Duluth, Minnesota, and Carlton, Minnesota, it owned during all the time mentioned in the complaint and still owns two lines of railway, one lying wholly within the State of Minnesota and the other extending from Duluth, Minnesota, through Wisconsin, to Carlton, Minnesota. The distance between said points via the intrastate line was 20.9 miles, and via the interstate line was 27.5 miles. All of the shipments of coal referred to in the complaint in the course of their carriage to the respective destinations named in the complaint passed through said station of Carlton, Minnesota, and must have passed through said station whether carried over the interstate line or the intrastate line of the defendant. The grades of said two lines, however, were such that in the ordinary and proper and expeditious and economical operation of its property, it was necessary to move, and this defendant in general did and does now, move all outbound shipments from Duluth via the interstate line and all in-bound shipments into Duluth via the intrastate line, and that to have carried the shipments referred to in the complaint to their respective destinations via said intrastate line instead of via the interstate line, over which they were actually carried, would have entailed great additional expense upon this defendant.

III.

Defendant further alleges that before the carriage by this defendant of any of the shipments referred to in the complaint a suit in equity was commenced in the Circuit Court of the United States District of Minnesota, Third Division, wherein Charles E. Perkins and David C. Shepard were plaintiffs and this defendant, Northern Pacific Railway Company, and certain individuals were defendants, in which suit the complaints asked that this defendant be enjoined from publishing or making effective the rates prescribed by said Chapter 232 of the laws of Minnesota for the year 1907, and that during the whole of the period referred to in said complaint this defendant was, by the order of said Circuit Court of the United States for the District of Minnesota, enjoined and restrained from publishing or making effective the rates prescribed in said Chapter 232 and that said order so enjoining and restraining this defendant was not dissolved until July, 1913, when it was dissolved pursuant to the mandate of the Supreme Court of the United States reversing said order of said Circuit Court of the United States for the District of Minnesota. Defendant alleges that during all of the time mentioned in the complaint, the rates actually published and collected by defendant for the carriage of coal from Duluth, Minnesota, to the respective destinations referred to in the complaint were the same via the intrastate line as via the interstate line of this defendant.

IV.

Defendant further alleges that the rates actually charged by it and collected from plaintiff for the carriage of shipments referred to in the complaint via its interstate line were just and reasonable rates for the service so performed by defendant; that all of said rates were duly collected pursuant to tariffs duly published and filed with the Interstate Commerce Commission, and were the legal rates for the service so rendered.

V.

Defendant further alleges that on or about December 24, 1915, and prior to the commencement of this action, in a proceeding brought before the Interstate Commerce Commission and entitled Holmes and Hallowell Company v. Great Northern Railway Company, et al., I. C. C. Docket No. 6194, and appearing in the 37th volume of the Interstate Commerce Commission reports at page 637, the Interstate Commerce Commission, after full consideration, held that the practice of this defendant in routing its west-bound shipments from Duluth over its interstate route was a proper and reasonable practice and denied the application of the petitioner in that case for reparation on shipments of coal to the extent of the difference between the rate applicable via the intrastate route under Chapter 232 of the laws of the State of Minnesota and the rate

actually charged via the interstate route over which such shipments moved.

Wherefore, having fully answered, defendant prays judgment for its costs.

CHARLES W. BUNN AND
CHARLES DONNELLY,
Attorneys for Defendant.

1018 N. P. Railway Building, Saint Paul, Minnesota.

Filed Jan. 20, 1917. N. C. Robinson, Clerk, by G. A. Johnson,
Deputy.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

DULUTH ELEVATOR COMPANY, a Corporation, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Demurrer to Answer.

I.

The plaintiff demurs to Subdivision I of the Answer herein on the ground that it does not state facts sufficient to constitute a defense.

11

II.

The plaintiff demurs to Subdivision II of the Answer herein on the ground that it does not state facts sufficient to constitute a defense.

III.

The plaintiff demurs to Subdivision III of the Answer herein on the ground that it does not state facts sufficient to constitute a defense.

IV.

The plaintiff demurs to Subdivision IV of the Answer herein on the ground that it does not state facts sufficient to constitute a defense.

V.

The plaintiff demurs to Subdivision V of the Answer herein on the ground that it does not state facts sufficient to constitute a defense.

ERNEST E. WATSON,
Attorney for Plaintiff.

1601-2 Pioneer Building, St. Paul, Minnesota.

Filed Jan. 17, 1917. N. C. Robinson, Clerk, by G. A. Johnson, Deputy.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

DULUTH ELEVATOR COMPANY, a Corporation, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Order Sustaining Demurrer.

The above entitled matter came duly on to be heard by the Court on January 20th, 1917, Ernest E. Watson, Esq., appearing
12 as attorney for plaintiff, and Messrs. C. W. Bunn and Charles Donnelly appearing as counsel for defendant. Said matter came on to be heard upon demurrer of plaintiff as set forth in the files herein.

Upon the files herein and briefs submitted by counsel, and being advised in the premises, it is

Ordered, that plaintiff's demurrer to the answer be sustained and that plaintiff have judgment thereon, but with leave to defendant to amend the answer, within twenty days from the filing hereof, if it desires so to do.

January 25, 1917.

HUGO O. HANFT,
Judge District Court.

A stay of twenty days from the filing hereof.

HANFT, J.

Memorandum.

The answer in the instant case is identical, except for names and shipment, with that in the Solum case reported in 157 N. W. 996, except that the present answer contains a new allegation in paragraph 5 thereof, setting up the decision of the Interstate Commerce Commission in the Holmes & Hallowell case, which had not been rendered when this answer was filed, nor when the matter was submitted to this Court in the Solum case. It had, however, been rendered when the Solum case was submitted to the Supreme Court of this State, the attention of this Court was called to it and the contention of defendant as to its effect in this class of cases
13 was presented at the hearing of the case in the Supreme Court of this state.

(See defendant's brief, pages 15 to 17 and appendix.)

The decision in the Solum case is therefore conclusive upon this Court, for which reason the demurrer is sustained.

HANFT, *Judge*.

Filed Jan. 25, 1917. N. C. Robinson, Clerk, by G. P. Ritt, Deputy.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

DULUTH ELEVATOR COMPANY, a Corporation, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Judgment.

Pursuant to the order duly made and filed in the above entitled action on the 25th day of January, A. D. 1917.

Now on motion of Ernest E. Watson, Esq., said attorney, It Is Hereby Adjudged that the plaintiff herein recover of said defendant Northern Pacific Railway Company the sum of one hundred fifty-four and 04/100 dollars damages, with twelve and 00/100 dollars costs and disbursements, in all amounting to \$166.04.

Signed this 5th day of February, A. D. 1917.

N. C. ROBINSON, *Clerk*,
By G. A. JOHNSON, *Deputy*.

Filed 5 day of Feb'y, A. D. 1917. N. C. Robinson, Clerk, by G. A. Johnson, Deputy Clerk.

14 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

DULUTH ELEVATOR COMPANY, a Corporation, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Notice of Appeal.

To the above named plaintiff, and to Ernest E. Watson, its Attorney, and to N. C. Robinson, Clerk of said Court:

You and each of you will please take notice that the defendant Northern Pacific Railway Company appeals to the Supreme Court of the State of Minnesota from the judgment in favor of the plaintiff

and against the Northern Pacific Railway Company in the sum of one hundred sixty-six dollars and four cents (\$166.04) rendered and entered on the 5th day of February, 1917, and from the whole thereof.

C. W. BUNN AND
CHARLES DONNELLY,
Attorneys for Defendant.

Due and personal service of the foregoing notice and receipt of a copy thereof are hereby admitted this 25th day of February, 1917. A bond for costs and the supercedeas bond required by sections 8002 and 8004 of the General Statutes of Minnesota, 1913, are hereby waived.

ERNEST E. WATSON,
Attorney for Plaintiff.

Due and personal service and receipt of a copy of the foregoing notice are hereby admitted this 23d day of February, 1917.

N. C. ROBINSON,
Clerk of Said District Court.

Filed Feb. 23, 1917. N. C. Robinson, Clerk, by G. P. Ritt, Deputy.
Filed Mar. 6, 1917. I. A. Caswell, Clerk.

15 STATE OF MINNESOTA,
County of Ramsey:

Second Judicial District.

I, N. C. Robinson, Clerk of the District Court, Ramsey County and State of Minnesota, do hereby certify and return to the Honorable the Supreme Court of said State, that I have compared the foregoing paper writing with the original notice of appeal and waiver of bond in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original, and the whole thereof.

Witness my hand and the seal of said Court, at St. Paul, this 23d day of Feb'y A. D. 1917.

[District Court Seal.]

N. C. ROBINSON, *Clerk,*
By G. P. RITT, *Deputy Clerk.*

20388.

Filed Mar. 6, 1917. I. A. Caswell, Clerk.

16 In the Supreme Court of the State of Minnesota.

- 20388.

DULUTH ELEVATOR COMPANY, Respondent,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

It is agreed between the parties hereto that the correct amount of the judgment to be entered in the above case pursuant to the order of April 13, 1917, is one hundred ninety-five dollars and fifty-four cents (\$195.54); and it is further agreed that judgment may be entered today instead of waiting until expiration of twenty day period.

CHARLES W. BUNN AND
CHARLES DONNELLY,
Attorneys for Appellant.

ERNEST E. WATSON,
Attorney for Respondent.

Dated May 2, 1917.

Filed May 2, 1917. I. A. Caswell, Clerk.

17 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1917.

No. 186.

DULUTH ELEVATOR COMPANY, Respondent,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause April 13, A. D. 1917—

It is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court of the Second Judicial District, sitting within and for the County of Ramsey be and the same hereby is in all things affirmed.

And it is further determined and adjudged that the Respondent above named, do have and recover of said Appellant herein the sum and amount of one hundred ninety-five and 54/100 Dollars (\$195.54) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed May 2, A. D. 1917.

BY THE COURT.

Attest:

I. A. CASWELL, Clerk.

Statement for Judgment.

Total costs stipulated \$195.54.

18 STATE OF MINNESOTA,
 Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul May 2, A. D. 1917.

[Supreme Court Seal.]

I. A. CASWELL, *Clerk.*

[Endorsed:] State of Minnesota, Supreme Court. Transcript of Judgment. Filed May 2, A. D. 1917. I. A. Caswell, Clerk.

19 [Endorsed:] No. 20388. State of Minnesota. Supreme Court. Duluth Elevator Co., Respondent, against Northern Pacific Railway Company, Appellant. Judgment Roll. Filed May 2, 1917. I. A. Caswell, Clerk.

20 DULUTH ELEVATOR COMPANY, Respondent,

v.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

PER CURIAM:

This cause presents the same questions as were before the court and decided in *Solum v. Northern Pacific Railway Co.*, 133 Minn. 93, and *Monarch Elevator Co. v. Northern Pacific Railway Co.*, 133 Minn. 461, and for the reasons stated in the *Solum* case the judgment appealed from is affirmed.

[Endorsed:] 20388. State of Minnesota, Supreme Court. Duluth Elevator Company, Respondent, vs. Northern Pacific Ry. Co., Appellant. Per Curiam Opinion. Filed April 13, 1917. I. A. Caswell, Clerk.

21 In the Supreme Court of the State of Minnesota.

DULUTH ELEVATOR COMPANY, Respondent,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

Petition for Writ of Error.

The Northern Pacific Railway Company, appellant in the above entitled cause, feeling itself aggrieved by the judgment entered herein on the 2nd day of May, 1917, comes now, by Charles W. Bunn and Charles Donnelly, its attorneys, and petitions the said court for an order allowing said appellant to prosecute a writ of error to the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the Northern Pacific Railway Company shall give and furnish upon said writ of error and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States, and your petitioner will ever pray.

Dated May 2nd, 1917.

CHARLES W. BUNN AND
CHARLES DONNELLY,

Attorneys for Northern Pacific Railway Company.

22 It is ordered by this court that a writ of error be allowed as prayed for in the foregoing petition, provided, however, that the said Northern Pacific Railway Company, plaintiff in error, give bond according to law in the sum of 500 dollars, which said bond shall operate as a supersedeas bond.

Dated this 2nd day of May, 1917.

CALVIN L. BROWN,
*Chief Justice of the Supreme Court
of the State of Minnesota.*

23 [Endorsed:] 20388. In the Supreme Court of the State of Minnesota. Duluth Elevator Company, Respondent, v. Northern Pacific Railway Co., Appellant. Petition for Writ of Error. Filed May 2, 1917. I. A. Caswell, Clerk.

In the Supreme Court of the State of Minnesota.

DULUTH ELEVATOR COMPANY, Respondent,

VS.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

Assignments of Error.

Now comes the Northern Pacific Railway Company, the appellant above named, and says that the Supreme Court of the State of Minnesota erred in its decision and judgment in said cause as appears from the record therein, and that the errors committed are as follows:

1. The court erred in holding that the cause of action herein is not affected by the federal statute regulating interstate commerce.

2. The court erred in holding that, notwithstanding the finding of the Interstate Commerce Commission that the practice of routing outbound shipments from Duluth via defendant's interstate route was a proper and reasonable practice, the rate prescribed by the state statute should have been applied.

3. The court erred in holding that the state courts of Minnesota had jurisdiction of said cause in advance of a determination by the Interstate Commerce Commission as to whether the practice of the Northern Pacific Railway Company in moving via its interstate route all shipments of the character involved in said cause was reasonable.

Wherefore, The Northern Pacific Railway Company prays that for the errors aforesaid the said judgment be reversed.

Dated this 2nd day of May, 1917.

CHARLES W. BUNN AND
CHARLES DONNELLY,

Attorneys for Northern Pacific Railway Company.

[Endorsed:] 20388. In the Supreme Court of the State of Minnesota. Duluth Elevator Company, Respondent, v. Northern Pacific Railway Co., Appellant. Assignments of Error. Filed May 2, 1917. I. A. Caswell, Clerk.

27

(Copy.)

In the Supreme Court of the State of Minnesota.

DULUTH ELEVATOR COMPANY, Respondent,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

Bond.

Know all men by these presents, That we, Northern Pacific Railway Company, a corporation, as principal, and the National Surety Company, a corporation, as surety, are held and firmly bound unto the above named respondent, Duluth Elevator Company, in the sum of Five Hundred dollars (\$500.00), to be paid to it and for the payment of which we bind ourselves and our successors and assigns firmly by these presents.

Sealed with our seals and dated the 2nd day of May, A. D. 1917.

The condition of this obligation is such that, whereas, the said Northern Pacific Railway Company, plaintiff in error, seeks to prosecute its writ of error in the Supreme Court of the United States and to reverse the judgment rendered in the above entitled cause by the Supreme Court of the State of Minnesota.

Now, therefore, if the above named plaintiff in error shall prosecute its writ of error to effect and answer all costs and damages which may be adjudged, if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

NORTHERN PACIFIC RAILWAY COMPANY,

By CHARLES W. BUNN AND
CHARLES DONNELLY,*Its Attorneys.*

NATIONAL SURETY COMPANY,

By L. A. GREEN, *Attorney in Fact.*

(Copy.)

Approved:

CALVIN L. BROWN,

Chief Justice Supreme Court of Minnesota.

27½ [Endorsed:] 20388. In the Supreme Court of the State of Minnesota, Duluth Elevator Company, Respondent, v. Northern Pacific Railway Co., Appellant. Filed May 2, 1917. I. A. Caswell, Clerk.

28 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Minnesota, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Minnesota, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Northern Pacific Railway Company, plaintiff in error, and Duluth Elevator Company, defendant in error, wherein was drawn in question the validity of an authority exercised under the United States, and the decision was against its validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, Treaties or Laws of the United States and the decision was in favor of such their validity; a manifest error hath happened to the great damage of the said Northern Pacific Railway Company as by its said complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 2nd day of May, in the year of our Lord one thousand nine hundred and seventeen.

[Seal U. S. Dist. Court, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,
*Clerk of the United States District Court
for the District of Minnesota.*

Allowed, May 2nd, 1917.

CALVIN L. BROWN,
Chief Justice Supreme Court of Minnesota.

20 [Endorsed:] 20388. In the Supreme Court of the State of Minnesota. Duluth Elevator Company, Defendant in Error, vs. Northern Pacific Railway Co., Plaintiff in Error. Writ of Error. Filed May 2, 1917. I. A. Caswell, Clerk.

30 UNITED STATES OF AMERICA, ss:

To Duluth Elevator Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C. within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Minnesota, wherein Northern Pacific Railway Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Calvin L. Brown, Chief Justice of the Supreme Court of the State of Minnesota, this 2nd day of May, in the year of our Lord, one thousand nine hundred and seventeen.

CALVIN L. BROWN,

*Chief Justice of the Supreme Court of the
State of Minnesota.*

Service of the foregoing citation admitted and receipt of a copy thereof acknowledged this 2nd day of May, 1917.

ERNEST E. WATSON,

Attorney for Duluth Elevator Company.

31 [Endorsed:] 20388. In the Supreme Court of the State of Minnesota. Duluth Elevator Company, Defendant in Error, v. Northern Pacific Railway Co., Plaintiff in Error. Citation. Filed May 2, 1917. I. A. Caswell, Clerk.

32 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, clerk of the said court, do hereby certify that there was lodged with me as such clerk on May 2nd, 1917, in the matter of Duluth Elevator Company, Respondent, v. Northern Pacific Railway Company, Appellant.

1. The original bond of which a copy is herein set forth;
2. Copies of the writ of error, as herein set forth,—one for each defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this 2nd day of May, 1917.

I. A. CASWELL,

Clerk Supreme Court of Minnesota.

33 [Endorsed:] 20388. In the Supreme Court of the State of Minnesota. Duluth Elevator Company, Respondent, v. Northern Pacific Railway Co., Appellant. Certificate of Lodgment.

34 In the Supreme Court of the State of Minnesota.

DULUTH ELEVATOR COMPANY, Respondent,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

To the Clerk of the above named Court:

Will you please prepare transcript of record on writ of error carrying the above entitled cause to the Supreme Court of the United States for review, said transcript to consist of the following:

1. Complete return to your court as made by the Clerk of the District Court of Ramsey County, Minnesota, in which said cause originated.

2. Transcript of all proceedings in the Supreme Court of Minnesota, including the judgment entered therein and the opinion of the court therein.

3. The original petition for writ of error, original assignments of error, copy of bond, original writ of error, original citation and this præcipe for transcript.

4. Your certificate.

CHARLES W. BUNN AND
CHARLES DONNELLY,

Attorneys for Northern Pacific Railway Company.

Due service of the foregoing præcipe and receipt of a copy thereof acknowledged this 2nd day of May, 1917.

ERNEST E. WATSON,
Attorneys for Respondent.

35 [Endorsed:] 20388. In the Supreme Court of the State of Minnesota. Duluth Elevator Company, Respondent, v. Northern Pacific Railway Co., Appellant. Præcipe for Transcript. Filed May 2, 1917. *Filed May 2, 1917.* I. A. Caswell, Clerk.

Endorsed on cover: File No. 25,993. Minnesota Supreme Court. Term No. 1163. The Northern Pacific Railway Company, plaintiff in error, vs. Duluth Elevator Company. Filed June 5th, 1917. File No. 25,993.

FEB 21 1918

JAMES D. WAHER,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1917

No. 205.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

M. J. SOLUM.

No. 206.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

MONARCH ELEVATOR COMPANY.

No. 526.

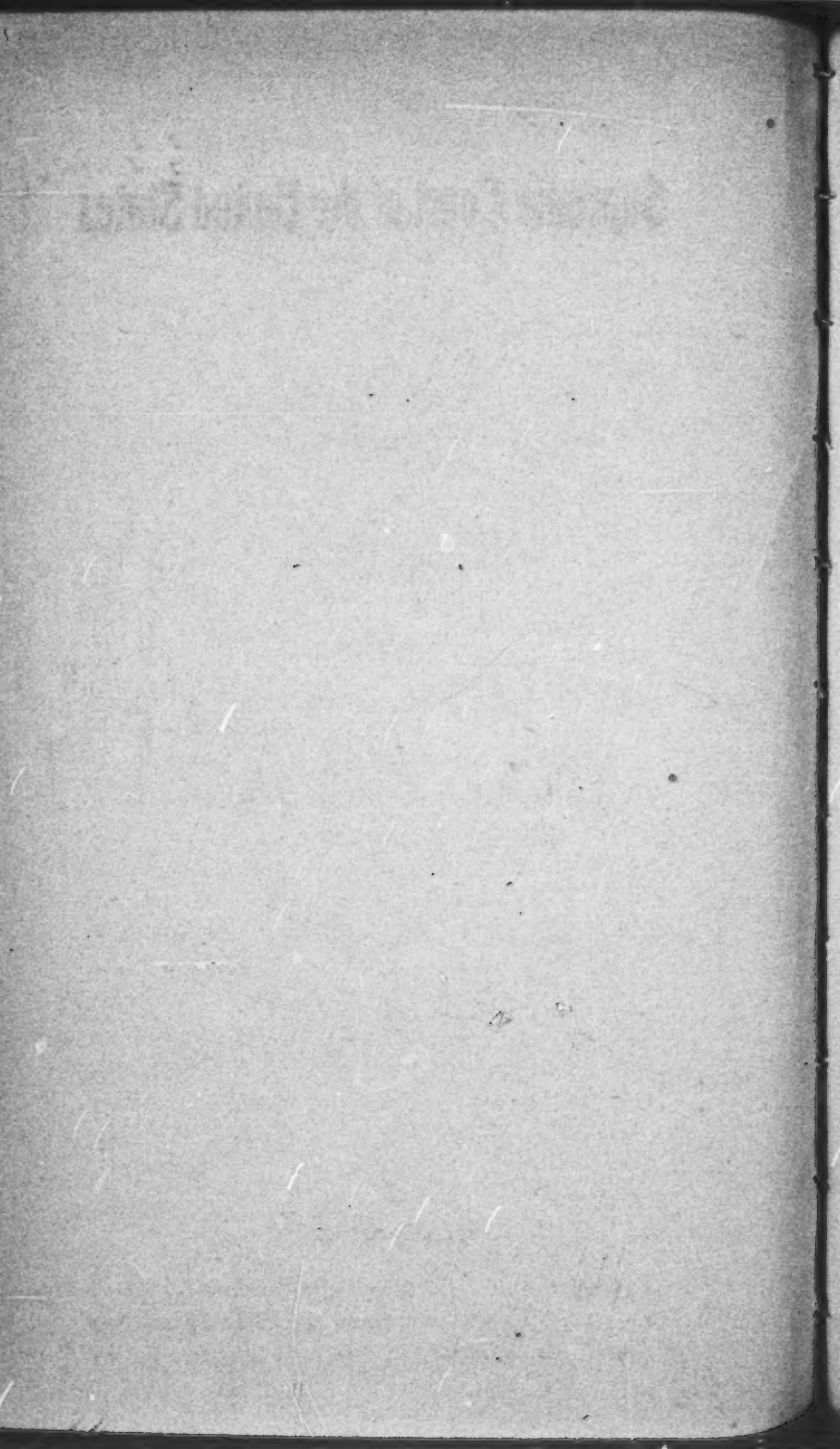
NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

DULUTH ELEVATOR COMPANY.

BRIEF OF PLAINTIFF IN ERROR.

CHARLES W. BUNN,
CHARLES DONNELLY.



Supreme Court of the United States

OCTOBER TERM, 1917

No. 205.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

M. J. SOLUM.

No. 206.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

MONARCH ELEVATOR COMPANY.

No. 526.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

DULUTH ELEVATOR COMPANY.

STATEMENT.

These are writs of error to the Supreme Court of Minnesota to review judgments recovered against the Northern Pacific Railway Company on account of

what is alleged to have been the misrouting of certain shipments of coal between Duluth, Minnesota, and points in the western part of that state. These shipments were carried in interstate commerce through Wisconsin, and the published interstate rates were collected for their carriage. The shippers contended that they ought to have been carried entirely within the State of Minnesota and that the state rates ought to have been applied to them. The judgments are for the difference between the amounts actually collected and the lesser amounts which would have been collected had the state rates been applied. The questions presented are identical in the three cases; there are only minor differences in the records, and the decision of any one of them will control the other two. The facts are as follows:

Between Duluth, Minnesota, and Carlton, Minnesota, the Northern Pacific Railway Company has two lines of railway. One of these is its original line constructed in 1885, extending from Duluth through Wisconsin to Carlton, Minnesota, and thence west to the Pacific coast. The distance to Carlton via this line is 27.5 miles, 11.7 miles of this distance being in Wisconsin. The other line was purchased in 1900 from the St. Paul and Duluth Railroad Company, and extends from Duluth to Carlton, Minnesota, and thence to the Twin Cities. It lies entirely in Minnesota, the distance from Duluth to Carlton via this line being 20.9 miles. The appended sketch shows the location of the two lines, the line through Wisconsin being colored red.

Since 1900, both these lines have been operated by the Northern Pacific Railway Company. Rates from and to Duluth to and from other Minnesota points have been published applicable via both routes, the rates applicable via the Minnesota route being filed with the Minnesota Commission, while the rates applicable via the interstate route have been filed with the Interstate Commerce Commission and have been in all cases identical with the Minnesota rates. But while the rates, as published, applied via both routes, the grade of the Minnesota route between Duluth and Carlton is such that that route has been used, with but few exceptions, only for inbound shipments into Duluth, all outbound shipments from Duluth, whether destined to Minnesota points or to points in other states, being moved through Wisconsin via the interstate route.

By Chapter 232 of the General Laws of Minnesota for 1907, the Legislature of that state fixed maximum rates for the carriage of coal. These rates were considerably lower than the rates then in effect. By its terms this law was to become effective June 1, 1907, and the rates named therein would have been applicable via the Minnesota route on that date but for the fact that the carrier was enjoined in a suit begun by its stockholders from making them effective. This injunction continued in effect until July, 1913, when it was dissolved in consequence of the decision of this court in *Minnesota Rate Cases*, 230 U. S. 352. Throughout the period while it was in effect, plaintiff in error charged, on all shipments of coal from Duluth to Minnesota points, whether moving via the interstate route or whether moving (as in rare instances they did move) via the state route, the regularly published rates, on file with both the Interstate Commerce Commis-

sion and the Minnesota Commission, and disregarded entirely the requirements of Chapter 232.

After the dissolution of the injunction plaintiff in error refunded on the few shipments which had been carried over the state route, the amount by which the charges actually collected exceeded the charges which would have been collected had Chapter 232 been observed. It refused to make any refund on shipments moved through Wisconsin; and these cases were begun to recover the excess.

In No. 205 there is involved a shipment of coal to Hitterdal, Minnesota; in No. 206 a shipment to Battle Lake, Minnesota, and in No. 526 a shipment to Hawley, Minnesota. All these points are shown in the appended sketch. The shipment in each case was delivered to plaintiff in error during the period while the injunction was in effect, and without any instructions as to how it should be routed; and in the complaint in each case it is alleged that it was the duty of plaintiff in error, notwithstanding the failure to give routing instructions, to have moved the shipment via the state route. The answer in each case sets up the injunction proceeding above referred to, the fact that at the time when the shipments moved the rates actually published and in effect via the two lines were identical, and the fact that "in the ordinary and proper and economical operation of its property, it was necessary to move, and that in general plaintiff in error did move all outbound shipments from Duluth via its interstate line." It is alleged further in the answer that the rates actually charged and collected were just and reasonable rates for the service performed and that they were collected pursuant to tariffs duly published and filed with the Interstate Commerce Commission. In each case

a demurrer was interposed to this answer and the cases were heard on the demurrer. The trial court gave judgment to defendant in error in each case, awarding as damages the difference between the charges collected and the charges prescribed by the Minnesota statute. The Supreme Court affirmed this judgment in each case. Its opinion appears at page 10 of the record in No. 205. These writs of error are brought to review the judgment of the Supreme Court.

SPECIFICATIONS OF ERROR.

1. The Court erred in holding that any court had jurisdiction to allow damages for routing these shipments via the interstate routes, in advance of a determination by the Interstate Commerce Commission whether the practice of so routing them was reasonable, and whether reparation should be paid.

2. The Court erred in holding that plaintiff in error had no right to use its interstate route for the carriage of these shipments.

3. The Court erred in affirming the judgments in favor of defendant in error.

ARGUMENT.

As actually carried these shipments, moving as they did through two states, were interstate shipments. The Court below does not question this. It had recognized, in a previous decision, that such shipments were interstate, *Hardwick Elevator Co. v. Railway Co.*, 110 Minn. 25; and the decisions of this Court would seem to set the question at rest. *Hanley v. Kansas City Southern Ry. Co.*, 187 U. S. 617; *Minnesota Rate Cases*, 230 U. S. 352, 383; *Wilmington Transportation*

Co. v. R. R. Commission of California, 236 U. S. 151. These decisions have been followed consistently by the inferior Federal Courts. *U. S. v. Delaware, Etc., Ry. Co.*, 152 Fed. 269; *U. S. v. Erie Ry. Co.*, 166 Fed. 352; *St. Louis, Etc., Ry. Co. v. Hadley*, 168 Fed. 317; *St. Louis, Etc., Ry. Co. v. Allen*, 181 Fed. 710.

The traffic in question, then, moved in interstate commerce. It moved thus, as the answers show (and these stand admitted) "*in the ordinary and proper and economical operation*" of the railroad over which it was shipped. The rates charged for its carriage were "*just and reasonable rates*," "collected pursuant to tariffs duly published and filed with the Interstate Commerce Commission;" and they were, moreover, identical with the rates actually in effect via the intrastate line. The Court below holds that out of the moneys thus collected under interstate tariffs for these interstate shipments, plaintiff in error must refund everything in excess of what would have been collected if the rates prescribed for the Minnesota distance by the Minnesota statute had been applied. But if the practice of moving such shipments over the interstate route was reasonable, plaintiff in error had a right to move them that way; and to remit any portion of the charges collected under the published tariffs would be a violation of the Elkins Law and of the Act to Regulate Commerce. The question, then as to whether this practice was reasonable, and whether any portion of those charges may be refunded is one which the Interstate Commerce Commission must decide; and until decided by that tribunal no court has jurisdiction to consider it. Such is the effect of all of the decisions of this Court touching this question. *T. & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *B. & O. R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481; *Robinson v. B. & O. R. R. Co.*, 222 U. S. 506; *P. R. R. Co.*

v. International Coal Mining Co., 230 U. S. 184; *Mitchell Coal & Coke Co. v. P. R. R. Co.*, 230 U. S. 247; *Morrisdale Coal Co. v. P. R. R. Co.*, 230 U. S. 304.

It was argued below that the doctrine of these cases applies only when a question is raised as to whether a particular rate is or is not reasonable, or is or is not unduly discriminatory. This is not so. The doctrine applies as well to any rule or practice of the carrier which gives rise to the application of the rate. Thus in *P. R. R. Co. v. International Coal Mining Co.*, *supra*, it was said at p. 196:

"Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon difference in conditions are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals."

And again in *Mitchell Coal & Coke Co. v. P. R. R. Co.*, *supra*, it was said at pp. 258-260:

"In considering the administrative questions as to reasonableness, the elements of the problem are the same, *whether they involve the validity of obsolete allowances, discarded tariffs, or current rates*

and practices. In both classes of cases there is a call for the exercise of the rate-regulating discretion and the same necessity for having the matter settled by a single tribunal. *For if at the suit of one shipper, a court could hold a past rate or allowance to have been unreasonable and award damages accordingly, it is manifest that such shipper would secure a belated but undue preference over others who had not sued and could not avail themselves of the verdict.* But more than this—to permit separate suits and separate findings would not only destroy the equality which the statute intended should be permanent, even after the rates had been changed, but it would bring about direct conflict in the administration of the law. Under the statute the carrier has the primary right to fix rates, and so long as they are acquiesced in by the Commission the carrier and shippers are alike bound to treat them as lawful. After the rate had been abandoned the carrier is still obliged to treat it as having been lawful, and cannot refund what had been collected under it until the Commission determines that what was apparently reasonable had in fact been unreasonable. But such a determination cannot be made by the courts, for they would not only have first to exercise an administrative function and make a rate by which to measure the reasonableness of the charge collected, but they would have to go further and treat as unreasonable a rate, past or present, which the statute had declared should be deemed lawful until it had been held to be otherwise by the Commission.

“As to past and present practices for allowances, the Commission has the same power and there is the same necessity to take preliminary action. This was recognized in *Texas &c. Ry. v. Abilene Co.*, 204 U. S. 426, where, after considering §§ 8 and 22, relating to jurisdiction and the statutory and common law remedy, it was said that although a railroad might alter its rates voluntarily or in

obedience to an order of the Commission, yet it can 'not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force.' A contrary ruling would upset a useful, time-saving, economical and established practice. For in accordance with this construction of the act the Commission, after the abandonment of a rate, has repeatedly received and heard complaints and, upon finding that it had been unreasonable, has granted reparation accordingly. See *Arkansas Fuel Co. v. C. M. & St. P. Ry. Co.*, 16 I. C. C. 95, 98; *Allen & Co. v. C. M. & St. P. Ry. Co.*, 16 I. C. C. 293, 295."

All of this is recognized by the Interstate Commerce Commission and that tribunal has long exercised jurisdiction over claims for damages on account of misrouting. *Woodward & Dickerson v. L. & N. R. R. Co.*, 15 I. C. C. 170; sustained by the U. S. Circuit Court of Appeals for the 6th Circuit, 191 Fed. 705; *Noble v. Jonesboro, Lake City & Eastern R. R. Co.*, 20 I. C. C. 520. It exercises this jurisdiction in cases where the misrouting is alleged to have arisen from the failure of the carrier to send the traffic via an intra-state route, as well as where it is alleged to have been due to a failure to select the cheaper of two interstate routes. *Lathrop Lbr. Co. v. Alabama & Gt. Southern Ry. Co.*, 27 I. C. C. 250; *Willman v. St. Louis, Iron Mountain & Southern Ry. Co.*, 22 I. C. C. 405; *Holmes & Hollowell Co. v. G. N. Ry. Co. et al.*, 37 I. C. C. 627; *Texarkana Pipe Works v. Beaumont, Etc., Ry. Co.*, 38 I. C. C. 341; *McCaull-Dinsmore Co. v. Great Northern Ry. Co.*, 41 I. C. C. 178; 47 I. C. C. 581; *Cardwell v. Rock Island Co.*, 42 I. C. C. 730.

The *Holmes & Hollowell* case, *supra*, is of special im-

portance in this connection because it presents not merely the precise question but the precise facts involved here. While the report bears the title of but a single case, it dealt with and disposed of a very large number of cases filed with the Interstate Commerce Commission in which the claimants sought exactly what the defendants in error seek in the cases at bar. Dealing with the same situation involved here, those claimants carried their grievances to the Commission; and they said there, as the defendants in error say here, that the Northern Pacific Railway Company was answerable as for misrouting when it moved shipments from Duluth to Minnesota points via its interstate line during the period while the injunction was in effect. Dealing with this contention, the Commission said, p. 648:

"Complainants in several of these cases seek to recover reparation upon the ground that shipments from Duluth over the line of the Northern Pacific to Minnesota points were misrouted. Allegations of misrouting are made, however, in but few of the complaints in which the Northern Pacific is a party defendant. The intrastate and interstate lines of that carrier come together at Carlton, Minn., 27 miles from Duluth via the intrastate line and a few miles more distant via the interstate line. Owing to the less favorable transportation conditions caused by grades on the intrastate line, shipments of coal and other commodities southbound and westbound have been routed by the Northern Pacific with few exceptions over its interstate line. No routing instructions to the contrary having been given by shippers, the same practice was followed during the injunction period. After the re-establishment of the lower intrastate rates the Northern Pacific was compelled to make refunds in the case of a few shipments which had moved wholly intrastate. Complain-

ants in some of these cases now contend that this defendant should have routed all shipments during the injunction period via its intrastate line, upon the theory that the lower intrastate rates, although enjoined, were at all times the lawful rates, and that had the shipments been so routed these complainants would have received refunds. This contention is not well founded. In routing the shipments here involved over its interstate line the Northern Pacific followed its usual course and charged its lawfully published rates, which were at all times the same over both routes. Inasmuch as the shippers gave no routing instructions and there was no difference in the charges which might lawfully be collected for transportation over either route at the time the shipments moved, the carrier was not required by law to change its methods of operation and abandon the use of its more favorable interstate line or take the risk of refunding part of the charges if subsequently compelled to make effective lower intrastate rates. The correctness of this conclusion becomes apparent when it is considered that the complainants have not shown that the interstate rates were unreasonable or that they have been unduly prejudiced by refunds made in the case of the few shipments which moved via the intrastate line."

In thus disposing of the question, the Commission proceeded in exact conformity with the decision of this Court in *Mitchell Coal & Coke Company v. Penn. R. R. Co.*, *supra*. It considered the question whether, in view of all the circumstances, the "practice" of the Northern Pacific Company in routing westbound shipments over its interstate line when specific instructions were not given was reasonable. Finding it to be reasonable it vindicated the Federal right, and rejected the claims. The question was clearly within its jurisdiction and from the very necessities of the case its

decision must be accepted by the courts. Had it been favorable to the shipper the decision of course would have inured to the benefit of all shippers similarly situated, and those shippers might thenceforth prosecute their claims in court, *A. J. Phillips Co. v. Grand Trunk Western Ry. Co.*, 236 U. S. 662; but to allow these judgments to stand is to give reparation to one shipper and deny it to another on precisely the same facts; and, as pointed out in the *Abilene case*, it would open the doors to all the evils which the Interstate Commerce Act was designed to guard against.

This finding of the Interstate Commerce Commission the Court below utterly disregards; and, dealing with the same facts, it reaches an exactly opposite conclusion. It deals with the case as involving only the ordinary question of misrouting, and therefore as ruled by ordinary common law principles. The reasoning of its opinion is that here were two routes, equally available, the rates via one being lower than the rates via the other; therefore, it is said, it was the carrier's duty, even though no routing instructions were given, to consider the shipper's interest and move the shipment via the route taking the lower rate.

Conceding this to be the ordinary common law rule, there is still a question whether, even putting the interstate commerce feature on one side, it is proper to apply it where, as here, the carrier has been restrained by injunction from making the lower rate effective—an injunction, be it observed, which, as this Court said in the *Missouri Rate Cases*, 241 U. S. 533, operated while in effect, even though subsequently dissolved, "to restrain the giving effect of every vestige of state power which was embraced in the authority exerted by the state in passing the rate making law." To apply the rule under such

circumstances is to require the carrier, at its peril, to guess correctly whether the rate so enjoined will be ultimately struck down or upheld, and to give effect to this guess, in anticipation of the ultimate decision, even to the extent of changing completely its method of operation.

But if it be conceded that all this may be required where the routes and rates are subject to a single jurisdiction, it is difficult to see how such a rule can be applied, consistently with a recognition of the supremacy of Federal control, where one of the routes is interstate. The rule originated where the jurisdiction was single, and its application must be limited by the circumstances of its origin. In the *Minnesota Rate Cases*, 230 U. S. 352, 399, this Court said:

"There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

In *H. E. and W. T. Railway Co. v. U. S.*, 234 U. S. 342, known as the "*Shreveport case*," the ruling principle of the decision is thus expressed in the second paragraph of the syllabus:

"Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule; otherwise the Nation would not be supreme within the national field."

See also *American Express Co. v. Caldwell*, 244 U. S. 617, and *Illinois Central R. R. Co. v. Public Utilities Commission*, decided January 14, 1918.

Let these principles be applied to the case in hand. For the carriage of all coal from Duluth to the destinations in question the Northern Pacific Railway Company had an interstate railroad. Until the year 1900, when it purchased the St. Paul & Duluth railroad, it had no other line which could be used for that purpose; and after that year, because of more favorable grades and therefore of more economical operating conditions, the interstate line alone was used. It filed with the Interstate Commerce Commission the rates applicable over it, and these rates were just and reasonable; the demurrer so concedes. With these conditions in effect the State of Minnesota enacts a statute which, as construed by the Court below, says: "Discontinue henceforth your practice of using your interstate line for the movement of traffic between these points, divert all such traffic from interstate into state channels, and move it hereafter entirely within the State of Minnesota at greater expense to yourself, and at the lower rates herein prescribed." If the

state may require this, in the teeth of a finding by the Interstate Commerce Commission that the use of the interstate route was proper, it is vain to say that the Federal authority is supreme.

It is respectfully submitted that the judgment of the Court below should be reversed.

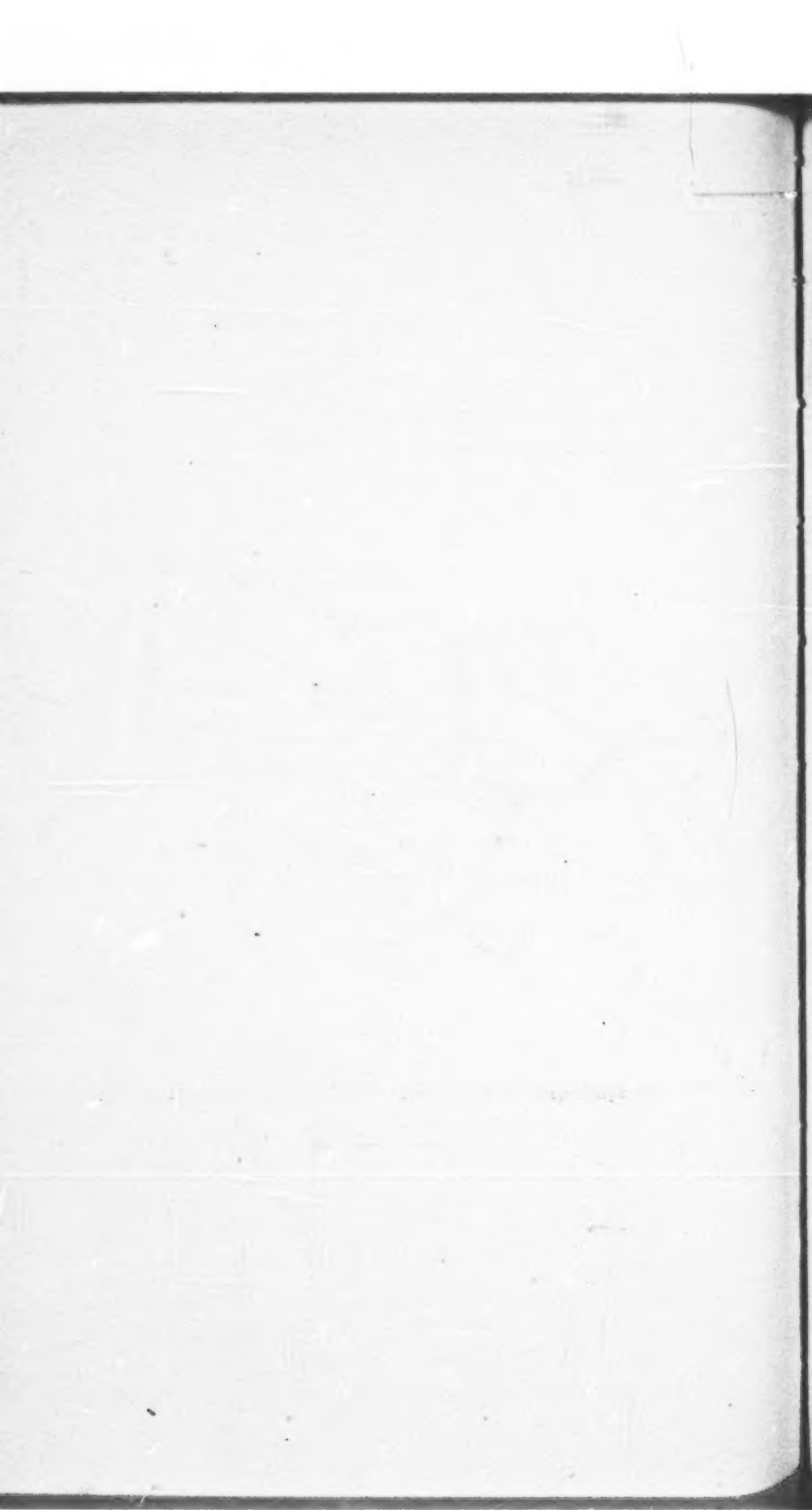
CHARLES W. BUNN.
CHARLES DONNELLY



The distances as shown on this sketch are not exactly as stated in the record, but the general



e quoted are unaffected by this difference and in any event the record, of course, controls.



12
MAR 6 1918

JAMES D. MAHER
CL

United States Supreme Court.

OCTOBER TERM, 1917.

No. 205.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VS.

M. J. SOLUM,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

LYNDON A. SMITH,
Attorney General, State of Minnesota.

HENRY C. FLANNERY,
Assistant Attorney General, State of Minnesota.
Attorneys for Defendant in Error.

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United States Supreme Court.

OCTOBER TERM, 1917.

No. 205.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

M. J. SOLUM,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

The route used by plaintiff in error for the transportation of the fourteen carloads of soft coal involved in this case was 234.7 miles in length, 11.7 miles of which were the State of Wisconsin. The rate which was collected therefore was \$2.00 per ton. The route, which the Supreme Court of Minnesota held should have been used, was but 228.11 miles in length and was entirely within

Note: The italics in this brief are ours unless otherwise indicated.

the State of Minnesota. The rate applicable thereto under Chapter 232, Laws of Minnesota of 1917, was \$1.28 per ton. (Said law is printed in this brief as Appendix A.) The former route will be called the "long line" and the latter route the "short line".

Plaintiff in error's statement that the long line between Duluth and Carlton was constructed in 1885, and that the short line between those points was purchased in 1900, should be supplemented with the statement that the plaintiff in error owned an interest in the short line and operated its trains, both into and out of Duluth, thereover, before the long line was constructed. (See the 4th and 5th paragraphs of a contract between plaintiff in error and the state of Minnesota which is printed herein as Appendix B.) Upon this point the Supreme Court said in its opinion:

"In fact that line was constructed first, and all freight, whether in or outbound was hauled over it until the construction of the interstate line several years later." (Record p. 13.)

Chapter 132, in which the rate of \$1.28 was prescribed, was unsuccessfully attacked by the plaintiff in error in the Minnesota Rate Cases. It is not now claimed that this rate was unreasonable. The court further said, in its opinion:

"There is no showing and no claim that it was not entirely feasible and practicable to haul freight shipped out of Duluth over the intrastate line."

Notwithstanding the fact that the short line rate was reasonable and the short line route was feasible, the shipments were so routed as to increase the freight rate over 56 per cent. The only reason given for so doing was that

it was more economical for plaintiff in error. As to this the court said :

"Although on account of easier grades it was more economical to haul out-bound shipments over the interstate line, yet so long as it was entirely feasible and practicable to haul such shipments over the intra-state line, defendant was not justified in serving its own interest at the expense of plaintiff."

It is a fact that plaintiff in error, because of the injunction "improvidently granted" in the Minnesota Rate Cases carried a rate of \$2.00 per ton over both lines in its tariffs. Chapter 232, however, by its terms became effective June 1, 1907, and the Supreme Court said in its opinion :

"As the state statute was a valid exercise of the legislative power it necessarily follows that the rates prescribed therein have been the lawful rates from the time that the statute declared they should go into effect."

This action was founded upon a breach of the common law duty of the plaintiff in error, in failing to route the shipments over the line which was the shorter and more direct and to which the lowest rate applied.

ARGUMENT.

I.

THE ONLY FEDERAL QUESTION FOR REVIEW IN THIS CASE IS WHETHER THE COURT ERRED IN HOLDING THAT IT HAD JURISDICTION.

Defendant in error respectfully submits that the only Federal question presented in this case is that stated in assignment of error No. 2, viz:

"The Court erred in holding that the state courts of Minnesota had jurisdiction of said cause in advance of a determination by the Interstate Commerce Commission as to whether the practice of the Northern Pacific Railway Company in moving via its interstate route all shipments of the character involved in said cause was reasonable."

This question was disposed of in the court's opinion as follows:

"It is also contended that the case here presented is one of misrouting over which the Interstate Commerce Commission has exclusive jurisdiction. We find no question involving any right given, regulated, or controlled by the federal law."

This statement in the opinion is the only place in the record where a Federal question is mentioned. It is therefore the only question for review.

Wilson v. McNamee, 102 U. S. 572.

Keokuk & H. Bridge Co. v. Illinois, 175 U. S. 626.

Dewey v. Des Moines, 173 U. S. 193.

Citizens Savings Bank v. Owensboro, 173 U. S. 636.

II.

THE ONLY OTHER QUESTIONS INVOLVED ARE QUESTIONS OF LOCAL LAW. IF THE STATE COURT HAD JURISDICTION ITS DECISION ON THEM IS FINAL.

It is important to note at the outset that the decision of the merits in this case only involved the determination of two questions of law. There were no questions of fact in issue. The two legal questions were: What was the carrier's duty, in routing these shipments; and, what was the measure of damages.

As to the first question the court found that the carrier's duty was governed by the common law and stated the applicable principle as follows:

"Where a railroad company operates two lines of railroad between the same points, and the freight rate over one line is less than such rate over the other line, if other conditions are reasonably equal, it is the duty of the company to transport shipments between those points which will give the shipper the benefit of the cheaper rate. To justify transporting such shipments over the other line and thereby compel the shipper to pay the higher rate, the company must show that such line was chosen by the shipper, or that the circumstances or exigencies were such that a proper regard for the interests of the shipper precluded the use of the cheaper line."

The measure of the damages was held to be the difference between the amount paid and the amount which the legislature prescribed as the lawful rate for the short line.

Both of these questions were questions of local law; and, if the State Court had jurisdiction, its decision on them is final.

Enterprise Irrig. Dist. v. Farmers Mutual Canal Co.,
243 U. S. 57.

Illinois Central Rd. Co. v. Mulberry Hill Coal Co.,
238 U. S. 275.

Eastern Ry. Co. v. Littlefield, 237 U. S. 140.

III.

THE LEGAL PRINCIPLES APPLIED BY THE INTERSTATE COMMERCE COMMISSION IN MISROUTING CASES IS IN HARMONY WITH THE PRINCIPLES APPLIED IN THIS CASE.

As stated by the plaintiff in error, the Interstate Commerce Commission has long exercised jurisdiction over claims for damages on account of misrouting and that jurisdiction has been exercised in cases where an intrastate and an interstate route were involved, as well as in cases where both routes were interstate. It does not follow, however, that such jurisdiction was exclusive, even though rightfully exercised.

We wish to call the court's attention to the fact that the legal principles applied by the Commission in misrouting cases have been in complete harmony with those applied by the court in this case. This is illustrated in the following cases:

"In a case where the shipper gives no such direction, but leaves it to the freight agent to select the route for him and to ship it by that route, such freight agent is the agent of the shipper as well as of the company in selecting the route which will be best and least expensive to the shipper, and should in every instance to the best of his knowledge and information select such route as will be best and least expensive.

to the shipper, and make such notation on the waybill as will properly carry the freight by that route."

Pankey v. The R. & D. R. Co. et al., 3 I. C. C. 658.

"It is the duty of a carrier, in the absence of routing instructions to the contrary, to forward shipments, having due regard to the interests of the shipper, ordinarily by that reasonable and practicable route over which the lowest charge for the transportation applies; and damages resulting to a shipper from a disregard of this obligation by the carrier can only be repaired by reparation to the extent of the difference between the higher rate applied over the line by which the traffic improperly moved and the lower rate which would have been applied had the freight been properly forwarded."

Hennepin Paper Co. v. Northern Pacific Ry. Co. et al., 12 I. C. C. 535.

"It is well settled that in the absence of specific routing instructions a carrier is obliged ordinarily to carry a given shipment tendered via the route taking the lowest rate."

Preston v. C. & O. Ry. Co., 16 I. C. C. 565.

The following cases also illustrate the point:

Lathrop Lumber Co. v. A. G. S. Ry. Co., 27 I. C. C. 250.

Chatanooga Brewing Co. v. L. & N. Rd. Co., 34 I. C. C. 719.

Flaccus Glass Co. v. C. C. & St. L. Ry. Co., 14 I. C. C. 333.

Thatcher Mfg. Co. v. N. Y. C. & H. Ry. Co., 16 I. C. C. 126.

Hendricksen Lumber Co. v. K. C. S. Ry. Co., 16 I. C. C. 129.

Texarkana Pipe Works v. K. C. S. Ry. Co., 38 I. C. C. 341.

Upon the admitted facts in this case it is therefore apparent that the carrier's duty to forward the shipments in question over the short line, and the measure of damages for its failure to do so, were precisely the same under the rule established by the Commission and the principle applied by the state court.

Plaintiff in error concedes that the common law rule, as stated by the Court is correct, but questions its application while the enforcement of the lower rates was restrained by injunction. It says:

"To apply the rule under such circumstances is to require the carrier, at its peril, to guess correctly whether the rate so enjoined will be ultimately struck down or upheld."

The duty "to guess" was not thrust upon either the plaintiff in error; nor was it their duty to speculate. The presumption of the validity of the state law attached to it from the moment of its approval by the Governor and this presumption was not removed either by the temporary restraining order, which was first issued, nor by the succeeding injunctions. There was nothing in the injunctions which necessitated the routing of the shipments in question over the long line. If plaintiff in error chose to do so, in the hope that it would ultimately prove successful in the injunction suit, it is not penalized therefore. It is only called upon to restore the amount which it collected, in excess of what it would have been permitted to collect had it assumed that the state law was constitutional and acted accordingly. What this argument of plaintiff in error really amounts to is this; having erroneously assumed that the legislative rates would be finally held to be invalid, and having acted on that assump-

tion, it should now be given the same benefit that would follow had the rates been so held.

IV.

IF THE INTERSTATE COMMERCE COMMISSION HAS JURISDICTION IN CASES OF THIS NATURE SUCH JURISDICTION IS NOT EXCLUSIVE.

An examination of the above cited misrouting cases, decided by the Commission, as well as those cited by the plaintiff in error discloses the fact that they fall into two very distinct classes.

The first class is comprised of cases, such as the one at bar, where the reasonableness of the rates applicable to the two routes is not questioned. In those cases the Commission has simply applied its well settled rule as to the duty of the carrier and awarded reparation amounting to the difference between the two rates.

In the second class the rate charged has been attacked as being unreasonable. In those cases it has been necessary for the Commission to decide what was the reasonable rate before it could render a decision. The case of *Holmes and Hallowell v. Great Northern Railway Company*, upon which plaintiff in error places great reliance and which will be later considered, was of that nature.

As to the second class of cases, perhaps the decision involves the exercise of the administrative function of the Commission, in determining whether an interstate rate is reasonable or unreasonable. It is not necessary to decide that question in this case.

We contend, however, that the Commission does not possess exclusive primary jurisdiction in the first class of cases. This is so for the following reasons:

The questions to be determined being only legal questions there is no occasion for the exercise of the administrative function of the Commission. The determination of such questions was a judicial, not an administrative act. We know of no case and certainly none of the cases cited by plaintiff in error held that the Act to Regulate Commerce has conferred upon the Commission the exclusive primary jurisdiction to pass upon a question of law.

The issues do not require preliminary action by the Interstate Commerce Commission in order to maintain the uniformity contemplated by the Act to Regulate Commerce, which was spoken of in the International Coal Mining Case. The basis of recovery in the instant case is fixed and certain, without any action by the Interstate Commerce Commission; and this basis applies to every shipper who may have a right of action growing out of similar circumstances. The relief to which the defendant in error is entitled is simply the difference between the rates charged and the rates established by the Legislature of Minnesota, applicable to the intrastate line. This seems to us to conclusively establish the fact that no action is necessary on the part of the Interstate Commerce Commission, as a condition precedent to defendant in error's right to commence this action in the State court.

Moreover the Commission is itself in doubt as to its jurisdiction in these cases. The first case in which we can find that its jurisdiction was question was that of *McCaull-Dinsmore Co. v. G. N. Ry. Co.*, 41 I. C. C. R

178. There there were both an intrastate route and an interstate route, a rate established by the legislature and a rate filed with the Interstate Commerce Commission. Moreover the "reasonableness of the rates charged was formally put in issue."

Reparation was awarded in the first decision and Commissioner Daniels filed a dissenting opinion, which is as follows:

"The common-law obligation resting on the carrier to transport an unrouted shipment in the best interests of the shipper would seem to require the carrier to make the shipment over the state route. To ship therefore over the interstate route amounted to a breach of obligation imposed by the common law of the state and apparently involved no violation of the Act to Regulate Commerce, *Solum v. N. P. Ry. Co.*, 157 N. W. 996. The fact that the particular shipment moved over an interstate route would enable this Commission to inquire into and determine the reasonableness of the rate charged for the service performed. This would go simply to the reasonableness of the rate assessed.

In awarding reparation to the extent of the difference between the charges paid over the interstate route and those which would have accrued had the shipment moved over the intrastate route, this Commission is in substance assuming without proof the reasonableness of a state rate. By awarding reparation on the basis of a state rate, it is a question whether we are not in effect determining the propriety of a rate wholly within the jurisdiction of a state.

Further we are not compelled to assume jurisdiction on the ground that the shipper would otherwise have no remedy. In a case presenting precisely the same question the Supreme Court of Minnesota has only recently awarded damages, *Solum v. N. P. Ry. Co.*, *supra*. The court said in part:

"It is also contended that the case here presented is one of misrouting over which the Interstate Com-

merce Commission has exclusive jurisdiction. We find no question involving any right given, regulated, or controlled by the federal law. Plaintiff was entitled to have his coal carried over the intrastate route and seeks to recover the damages he sustained by defendant's failure to carry it over that route. His right of action rests upon the common law, not upon the federal statute, and we fail to find any question requiring solution by the Interstate Commerce Commission. See *Pennsylvania Ry. Co. v. Puritan Coal Mining Co.*, 237 U. S. 121.'

As there is no practical reason for our taking jurisdiction in such a case as this, and since on principle it seems that no provision of the Act to Regulate Commerce is involved, I consider that the complaint should be dismissed."

There was a rehearing in this case, the decision being reported in 47 I. C. C. 581. It was therein said, "Defendant challenges our jurisdiction to award reparation on the basis of intrastate routes, and, as well, our decision on the merits." After stating "Waving the question of our jurisdiction," the complaints were ordered dismissed on the merits. This decision was filed December 17, 1917.

THE HOLMES AND HALLOWELL CASE.

Coming now to a consideration of the *Holmes & Hollowell* case, 37 I. C. C. 627, we challenge the statement in plaintiff in error's brief, that "it presents not merely the precise question but the precise facts involved here." In the first place that action was founded upon the claim that the interstate rates were unreasonable and unjustly discriminatory. This presented an entirely different question. The evidence consisted of comparisons between the rates charged, the Minnesota intrastate rates and rate comparisons, drawn from movements in various sections

of the United States. The facts, too, were therefore entirely different.

The decision, as stated in the last paragraph, is as follows:

"Upon all the facts of record we find that the rates here involved other than those on anthracite and bituminous coal have not been shown to be unreasonable and unjustly discriminatory. We further find that the rates on anthracite and bituminous coal here attacked have not been shown to be unreasonable, but it is found that unjust discrimination is caused by the relation of the coal rates in this territory. For the reasons stated all of these complaints which do not involve anthracite and bituminous coal will be dismissed. The complaints which do involve rates on coal will be held for further hearing, but only as to rates on coal."

The claims involving coal shipments are therefore still pending.

Furthermore, the decision of the Commission was apparently much influenced by what we regard as an unfortunate misconception of the status of the Chapter 232 rates, while the injunctions were in force. The Commission stated that the rates "were at all times the same over both routes." The Supreme Court, in the instant case, said:

"As the state statute was a valid exercise of the legislative power, it necessarily follows that the rates prescribed therein have been lawful rates from the time that the statute declared they should go into effect."

Thus the Commission and the Supreme Court differ upon this purely legal question. If the Commission had taken the same view as the court on this question, then it would have recognized the fact that, under the very

rules which it has so often followed, the shipments were misrouted.

It is true that the rates have been the same over both routes, since the injunctions were dissolved, because the plaintiff in error voluntarily reduced its rates over the long line to the basis of the short line rates. To hold that the rates were the same while the injunctions were in effect, however, is to hold that a state law, by its terms effective, which was sustained by this court, was nullified for the time being by injunctions, which temporarily prevented its enforcement, but which this court said were "improvidently granted" and ordered dissolved. That such was not the effect of the injunctions is shown by the many cases in this court and in the various state courts in which recoveries of overcharges, collected while such injunctions were in effect, were sustained.

We therefore respectfully submit that the Holmes and Hallowell case should not be considered as a precedent in any way effecting the case at bar; because the question of the exclusive jurisdiction of the Commission was not mentioned; because the issues both of law and of fact, were different; and, because the questions relating to coal shipments are still pending.

V.

THIS CASE IS NOT GOVERNED BY THE DOCTRINE OF THE ABILENE CASE AND OTHER CASES CITED BY THE PLAINTIFF IN ERROR, BECAUSE THERE IS NO ADMINISTRATIVE QUESTION INVOLVED TO REQUIRE THE PRELIMINARY ACTION OF THE INTERSTATE COMMERCE COMMISSION.

Plaintiff in error contends that this case contains a question which must be decided by the Interstate Com-

merce Commission before any court would have jurisdiction to consider it. In support thereof the following cases are cited: *T. & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *B. & O. Ry. Co. v. Pitcarin Coal Co.*, 215 U. S. 481; *Robinson v. B. & O. Ry. Co.*, 222 U. S. 506; *P. R. R. Co. v. International Coal Mining Co.*, 230 U. S. 184; *Mitchell Coal & Coke Co. v. P. R. R. Co.*, 230 U. S. 247; and *Morrisdale Coal Co. v. Pennsylvania Rd. Co.*, 230 U. S. 304.

An examination of the cases relief upon does not, in our opinion, bear out this contention.

The case of *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, *supra*, reversed a judgment of the Court of Civil Appeals for the State of Texas. The Oil company sued in the state court to recover, because of an exaction by the carrier, on an interstate shipment of *an alleged unreasonable rate*, although the rate charged was that stated in the schedule, duly filed and published in accordance with the act to regulate commerce. The Court of Civil Appeals reversed a judgment of the District Court in favor of the defendant.

In reversing the judgment of the Texas Court the Federal Supreme Court said:

"We say that these questions are only seemingly different, because they present but different phases of the fundamental question, which is the scope and effect of the act to regulate commerce upon the right of a shipper to maintain an action at law against a common carrier to recover damages *because of the exaction of an alleged unreasonable rate*, although the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission and published according to the require-

ments of the act to regulate commerce, and which it was the duty of the carrier under the law to enforce as against shippers."

The Court further said:

"Concluding, as we do, that a shipper seeking reparation *predicated upon the unreasonableness of the established rate* must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, *which body is alone vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable*, it is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief if the right asserted had not been repugnant to the provisions of the Act to Regulate Commerce."

In the case of *B. & O. R. Co. v. United States ex rel. Pitcairn Coal Co.*, *supra*, the Circuit Court of Appeals issued a decree which directed mandamus to issue, to redress grievances produced by regulation adopted by a railroad company for the distribution of coal cars in times of car shortage. In reversing the judgment, the Federal Court said:

"It is patent that the grievances involved acts of the Baltimore & Ohio Railroad, regulations adopted by that company and alleged dealings by the other corporations, *all of which, it is asserted, concern interstate commerce, and all of which, it is alleged, are in direct violation of the duty imposed upon the railroad company by the provisions of the act to regulate commerce*, . . . and an order, by way of mandamus, was invoked and was allowed, *which must operate, by judicial decree, upon all the numerous parties and various interests as a rule or regulation as to the matters complained of for the conduct of interstate commerce in the future*. When the situation is thus defined we see no escape from the conclusion that the grievances complained of were primarily

within the administrative competency of the Interstate Commerce Commission, and not subject to be judicially enforced; at least, until that body, clothed by statute with authority on the subject, had been afforded, by a complaint made to it, the opportunity to exert its administrative functions."

In the case of *Robinson v. B. & O. R. Co.*, supra, the facts were these: The interstate coal rate of the railway company, duly published and filed, prescribed an additional charge of 50 cents per ton where coal was loaded into the car from wagons instead of from a tippie. Robinson shipped eleven carloads of coal from Fairmont, West Virginia, to points in other states, loading the coal from wagons. "Conceiving that the *schedule unjustly discriminated between shipments loaded from tipples and those loaded from wagons*," he brought action in the state court to recover the excess so paid. The court entered a judgment dismissing the complaint which was affirmed by the Supreme Court of Appeals of the state.

In affirming the judgment of the state court the Federal Supreme Court said:

"The act * * * whilst prohibiting *unreasonable charges, unjust discriminations and undue preferences* by the carriers subject to its provisions, also prescribed the manner in which that prohibition should be enforced; * * * Thus for the purpose of preventing *unreasonable charges, unjust discriminations and undue preferences*, a system of establishing, maintaining and altering rate schedules and of redressing injuries resulting from their enforcement was adopted whereby publicity would be given to the rates, their application would be obligatory and uniform while they remained in effect, and the matter of their conformity to *prescribed standards* would be committed primarily to a single tribunal clothed with authority to investigate complaints and to order the

correction of any nonconformity to those standards by an appropriate change in schedules and by due reparation to injured persons.

When the purpose of the act and the means selected for the accomplishment of that purpose are understood it is altogether plain that the act contemplated that such an investigation and order by the designated tribunal, the Interstate Commerce Commission, should be a prerequisite to the right to seek reparation in the courts because of exactions under an established schedule *alleged to be violative of the prescribed standards.*"

In the case of Pennsylvania R. Co. v. International Coal Mining Co., *supra*, the suit was originally brought in the Circuit Court for the Eastern District of Pennsylvania. The railroad company charged the mining company its tariff rates on certain interstate shipments of coal. The mining company sought to recover the difference between the amount which it paid and that paid by other companies, the difference being caused by rebates to the other companies.

In disposing of the case the Federal Supreme Court said:

"Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the administrative and rate regulating body. For the reasonableness of rates, and the permissible discrimination based upon difference in conditions, are not matters of law. *So far as the determination depends on facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts.* That power has been vested in a single body, so as to secure uniformity and to prevent the varying and sometimes conflicting results

that would flow from the different views of the same facts that might be taken by different tribunals.

None of these considerations, however, operate to defeat the Court's jurisdiction in the present case."

The case of *Mitchell Coal Company v. Penn. R. Co.*, supra, was originally started in the United States Circuit Court. It was an action for damages claimed to have been sustained by the coal company by reason of the fact that while the railroad company had collected from it the full tariff rate on interstate coal shipments, it had paid rebates to competing companies, pretending that the same was an allowance for transportation services rendered by them in hauling cars from the mines to the station.

The question passed upon in that case by the Federal Supreme Court in deciding that the court was without jurisdiction is shown in the following excerpts from the opinion, pages 225 and 256:

"The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit *when the action is based on the claim that unreasonable allowances have been paid.* * * *

The necessity under the statute of having such questions settled by a single tribunal in order to secure singleness of practice and uniformity of rate has been pointed out and settled in *Abilene*, *Pitcairn* and *Robinson* cases, and is referred to here because this record and that in *Pennsylvania R. Co. v. International Coal Mining Co.*, just decided, furnish a striking illustration of the results which would follow *if the reasonableness of an allowance could be decided by different tribunals.* * * * This and like considerations compelled the holding that, *as the courts have no primary jurisdiction to fix rates*, neither can they do so at the suit of a single plaintiff who claims to

have been damaged *because an allowance paid its competitors was unreasonable in amount.*"

The case of *Morrisdale Coal Co. v. Pennsylvania R. Co.*, supra, was brought in the United States District Court. *The complaint alleged unjust discrimination in the distribution of coal cars, during a period of car shortage, and undue preference in favor of plaintiff's competitors.* It appeared that the cars were actually distributed according to the rule of the carrier.

In disposing of the question of the jurisdiction of the District Court it was said in the opinion, pages 312-313:

"The prohibitions of Section 3 of the Commerce Act require that cars shall be fairly allotted to shippers without unjust discrimination or unfair preference. But the statute does not define what is the proper method of distribution in cases of car shortage, and at the time of the transactions out of which this suit arose, no general rule had been adopted by the carriers or promulgated by the Commission.
* * *

These rules as to the validity of a particular practice and the facts that would warrant a departure from a proper rule actually in force are sufficient to show that the question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission."

To recapitulate:

In the *Abilene* case the action was "predicated upon the unreasonableness of the established rate," and the Court expressly declined to pass upon the question of whether or not the Texas Court would have had jurisdiction had the right asserted not been repugnant to the provisions of the act to regulate commerce.

In the Pitcairn case the regulations of the railway company for the distribution of cars were alleged to be in direct violation of provisions of the act to regulate commerce and the effect of the order of the court was to establish a regulation for the conduct of interstate commerce in the future.

In the Robinson case the established schedule of rates was alleged to be unjustly discriminatory as between cars loaded from wagons and those loaded from tipples. It was held that where a violation of a "standard," established by the act, is alleged an investigation and order of the Commission is necessary.

In the International Coal Mining Co. case this Court declined to hold that the Circuit Court was without jurisdiction where the action was to recover the difference between the scheduled rate paid by plaintiff and that paid by competitors, the difference being caused by rebates.

In the Mitchell case, which involved allowances to plaintiff's competitors for hauling cars from the mines to the station, this Court held that the court was without primary jurisdiction in the case, because it involved a question of rate fixing.

The Morrisdale case was based upon an alleged unjust discrimination in the distribution of coal cars which was prohibited by section 3 of the commerce act.

Thus, in the five cases in which the jurisdiction of the court was denied, one involved the question of the reasonableness of the established rate, three alleged violations of the act to regulate commerce and one involved a question of rate making.

In those cases the Court has only applied the principle stated on page 419, in the Minnesota Rate Cases, 230 U. S. 350, as follows:

"The dominating purpose of the statute was to secure uniformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court, without the preliminary action of the Commission, were to undertake to pass upon the administrative questions which the statute has primarily confided to it."

The case at bar differs from the above mentioned cases in several important respects.

1. It involves neither a question of the reasonableness of established rates, a question of discrimination, a violation of the act to regulate commerce, nor a question of rate making.

2. It does not involve the "examination and appreciation of the complex facts of transportation" which calls for the exercise of the administrative function of the Commission.

3. The facts were conceded and the question of whether there was a misrouting was purely a question of law.

4. The cause of action arose through a violation of a common-law duty, in no way traceable to a violation of the Commerce Act.

It is therefore our contention that the case at bar is not controlled by the decisions in the above mentioned cases.

VI.

WHERE A COURT HAS JURISDICTION OF A CASE INVOLVING A SINGLE INSTANCE OF MISROUTING THE MERE MULTIPLICATION OF SUCH INSTANCES DOES NOT DIVEST IT OF JURISDICTION.

Inasmuch as it was plaintiff in error's duty, both under the common law of Minnesota and the principles adopted and followed by the Interstate Commerce Commission, to route the shipments involved herein over the line taking the lowest rate, it was a violation of that duty to route them over the line taking the higher rate.

Plaintiff in error contends that because it generally moved all outbound shipments from Duluth in that manner that it had become a "practice," the reasonableness of which would have to be determined by the Interstate Commerce Commission, before an action, based on such violation, could be begun in the state court.

No such claim could consistently be made if these shipments were the only ones that had been thus misrouted. In that event the defendant in error would undoubtedly have been free to bring his action in the state court and the state court would have had jurisdiction.

The question then narrows itself down to this: Where a state court would have jurisdiction to redress a wrong caused by one violation of a duty, can it be deprived of such jurisdiction by the continued repetition of the wrong? It would seem that a mere statement of this question furnishes its best answer.

We cannot believe that the doctrine of the Abilene case would justify a holding that where a state court would have jurisdiction of one violation, a continued repetition

of such violation would deprive the court of its jurisdiction and transfer it to the Interstate Commerce Commission.

We therefore submit that the continued misrouting of shipments in a particular way by a carrier does not constitute a "practice," in the sense in which that word has been used by this Court, in the cases holding that the question of the reasonableness of the practice is for the Commission in the first instance.

The Court's attention is also respectfully called to the fact that this question of a "practice" was not raised by the defendant in error. It has been "imported" into the case by the plaintiff in error, just as the plaintiff in error, in the Mulberry Hill Coal Co. case, *supra*, sought to import the question of discrimination.

VII.

THE PLEADINGS CONTAIN NO REFERENCE TO THE COMMERCE ACT; THE GROUND OF RELIEF SOUGHT IS BASED SOLELY UPON A FAILURE TO COMPLY WITH A DUTY IMPOSED BY THE COMMON LAW, AND SUCH FAILURE IS IN NO WAY TRACEABLE TO A VIOLATION OF THE COMMERCE ACT. THIS CASE THEREFORE FALLS WITHIN THE PRINCIPLES OF THE CASES IN WHICH THE JURISDICTION OF THE STATE COURT HAS BEEN SUSTAINED.

The instant case is governed by the principles upon which were decided the cases of *Galveston, H. & S. A. R. Co. v. Wallace*, 223 U. S. 481; *Pennsylvania Rd. Co. v. Puritan Coal Min. Co.*, 237 U. S. 120; *Dancinger v. Wells Fargo & Co.*, 154 Fed. 379; *Louisville & Nashville R. R.*



Co. v. Cook Brewing Co., 172 Fed. 117 (Aff. 223 U. S. 70); Eastern Ry. Co. v. Littlefield, 237 U. S. 140; Illinois Central Rd. Co. v. Mulberry Hill Coal Co., 238 U. S. 275.

In the Wallace case, *supra*, the action was begun in the state court of Texas to recover damages from an initial carrier for failure of a connecting carrier to deliver a shipment of mohair. The shipment was interstate and the liability of the initial carrier was based on the Carmack amendment to the Hepburn bill of 1906, providing that where goods are received for shipment in interstate commerce, the initial carrier shall be liable for damages caused by itself or connecting carriers, and making void any contract of exemption against such liability. There was judgment for the plaintiff which was affirmed by the Texas Supreme Court. The case was then taken to the United States Supreme Court on a writ of error, where the objection to the jurisdiction of the state court was disposed of in the following language:

"The jurisdiction of the state court was attacked, first, on the ground that Section 9 of the original act of 1887 provided that persons damaged by a violation of the statute 'might make complaint before the Commission * * * or in any district or circuit court of the United States.' 24 Stat. at L. 379, Chap. 104 U. S. Comp. Stat. 1901, p. 3154.

It was contended that Texas & P. Ry. Co.: v. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann Cas. 1075, ruled that this jurisdiction was exclusive, and from that it was argued that no suit could be maintained in a state court on any cause of action created either by the original act of 1887, or by the amendment of 1906. But damage caused by failure to deliver goods is in no way traceable to a violation of the statute, and is not, therefore, within the provisions of Sections 8 and 9 of the act to regulate commerce. Atlantic Coast

R. Co. v. Riverside Mills, 219 U. S. 208, 55 L. ed. 179, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. Rep. 164."

In the case of the *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, *supra*, the railway company was sued in the state court for damages caused by its failure to furnish the Puritan Company with cars in which to load coal for shipment to points within and without the state. The pleadings alleged not only that the carrier had failed to perform its duty to furnish cars, but that, in violation of the state statute, it had unjustly discriminated against the Puritan Company by failing to distribute cars in accordance with the carrier's own rule. Plaintiff recovered judgment, which was affirmed by the State Supreme Court.

The case was then taken to the Supreme Court of the United States on a writ of error, the railway company claiming that the determination of the proper basis for the distribution of cars was a matter calling for the exercise of the power of the Interstate Commerce Commission.

In affirming the judgment of the State Supreme Court, this Court said, in its opinion:

"In the present case the pleadings contained no reference to the commerce act. The damages grew solely out of the fact that the Puritan Company failed to receive the number of cars to which it was entitled. The plaintiff's right and measure of recovery would have been exactly the same if the cars had been furnished to a manufacturing plant, instead of the Berwind-White Coal Company. The plaintiff's cause of action and damages would have been the same if the failure to receive the cars had been due to the fact that the carriers negligently allowed empty cars to stand on side tracks; or if, by reason of a negligent mistake, they had been sent to the wrong point. The motive causing the short supply of cars was therefore wholly immaterial, except as corrobora-

tion of other evidence showing an actual shortage of cars; so that, if we ignore the plaintiff's characterization of the defendant's conduct, and consider the nature of the case, alleged in the first court and established by the evidence, *it will appear that the Puritan Company was entitled to recover because of the fact that the carrier failed to comply with its common-law liability to furnish it with a proper number of cars. What was a proper supply was a matter of fact.*"

In discussing the effect of the commerce act on the court's jurisdiction, it was said:

"But sections 8 and 9, standing alone, might have been construed to give the Federal Courts exclusive jurisdiction of all suits for damages occasioned by the carrier violating any of the old duties which were preserved and the new obligations which were imposed by the commerce act. And evidently, for the purpose of preventing such a result, the proviso to Section 22 declared that 'nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.'

That proviso was added at the end of the statute, not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute. *It was also intended to preserve existing remedies, such as those by which a shipper could, in a State Court, recover for damages to property while in the hands of the interstate carrier: damages caused by delay in shipments; damages caused by failure to comply with its common law duties, and the like.* But for this proviso to Section 22 it might have been claimed that, Congress having entered the field, the whole subject of liability of carrier and shippers in interstate commerce had been withdrawn from the jurisdiction of the state courts, and this clause was added to indicate that the commerce act, in giving rights of action in Federal Courts, was not intended to deprive state courts of their general and concurrent jurisdiction. *Galveston, H. & S. A.*

R. Co. v. Wallace, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205."

The case of *Eastern R. Co. v. Littlefield*, *supra*, was originally brought in the Texas District Court. It was an action to recover damages for failure to furnish cattle cars. After judgment for the plaintiff was affirmed by the State Supreme Court the case was taken to the United States Supreme Court on a writ of error. The cause of action was based upon defendant's breach of its common-law duty to furnish sufficient cars after due and reasonable notice so to do. After judgment for the plaintiff was affirmed by the Texas Supreme Court the case was taken to the United States Supreme Court on a writ of error.

The railway company claimed that a Federal question and one calling for the administrative function of the Commission was raised by the contention in defendants' answer that plaintiff's demand for cars was unreasonable, and as the defendants were unable to comply with the demand, they are not liable for failure to furnish the cars within the time, as alleged.

In sustaining the jurisdiction of the State Court it was said in the opinion:

"The question as to whether at common law these railroads were liable as forwarders of freight to be delivered to connecting carriers outside the state, and whether the railways were so associated as to make them jointly and severally liable are matters concluded by the decision of the Supreme Court of Texas. There is no merit in the Federal question relied on and the writ of error is dismissed."

In *Dancinger v. Wells Fargo & Co.*, *supra*, the bill of complaint involved the right of complainant to a manda-

tory order of injunction, commanding the defendant common carrier to receive and carry liquor sold by complainant in the state of Missouri to many persons throughout the country. In defense to the bill of complaint, the defendant contended that the Interstate Commerce Commission had original and exclusive jurisdiction of the question. In reply to this contention of defendant, the Court said:

"A further contention made by the defendant is that the court of exclusive, original jurisdiction in this controversy is the Interstate Commerce Commission, and that this court has no jurisdiction in the first instance to afford the relief here sought; and much reliance is placed by the defendant on the case of *Texas & Pacific Railway v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. ed. 553. From a reading of that case I do not consider it applicable to the state of facts here presented. If the controversy here was as to whether the defendant was charging excessive or unreasonable rates for the shipments tendered by complainant, the case relied on would to my mind be in point; but as the ground of relief sought by complainant in the case at bar is the performance by the defendant of a duty imposed upon them by law they wholly neglect and refuse to perform, I think such question is one for the determination of the court."

In the case of *Louisville & Nashville R. R. Co. v. Cook Brewing Co.*, supra, the facts were substantially the same as in the *Dancinger* case, supra, with the additional fact that the carrier had published its rule in its tariffs on file with the Interstate Commerce Commission. The court, in its opinion, said:

"The contention that appellee's remedy, if any, was limited to proceedings before the Interstate Commerce Commission, we deem untenable. No complaint was made that the beer rate was unreasonable, either in themselves or on comparison with rates for other

commodities, or that the appellee was subjected to any undue disadvantage in its competition with other brewers, or that Evansville was discriminated against. Any such complaint would go to the Commission. But the suit here was based on appellee's refusal to carry under any circumstances goods of a class for which appellant had made generally a classification and rate. Whether the refusal to carry the property in question, like a refusal to carry some person, was justified or not, we believe is a question of common law, not an interpretation and application of any provision of the Interstate Commerce Act. And the act itself provides that nothing therein should in any way abridge the remedies at common law."

In this case the shipments were delivered to the carrier at a station in Minnesota, to be transported to another station in Minnesota, by a carrier having a line wholly within the state. The rates were established by the state law. Under the common law of the state the carrier was in duty bound to forward the shipment over that line. The duty was violated. The action was brought in the state court to recover damages. It was based, not on the Commerce Act, but on the state law. It presented no administrative questions, only questions of law. No preliminary action was necessary to maintain uniformity. This court is asked to hold that the state court was without jurisdiction; not because its jurisdiction, otherwise so clear, was taken away by the express words of the commerce act, but by implication. In the Abilene case it was said:

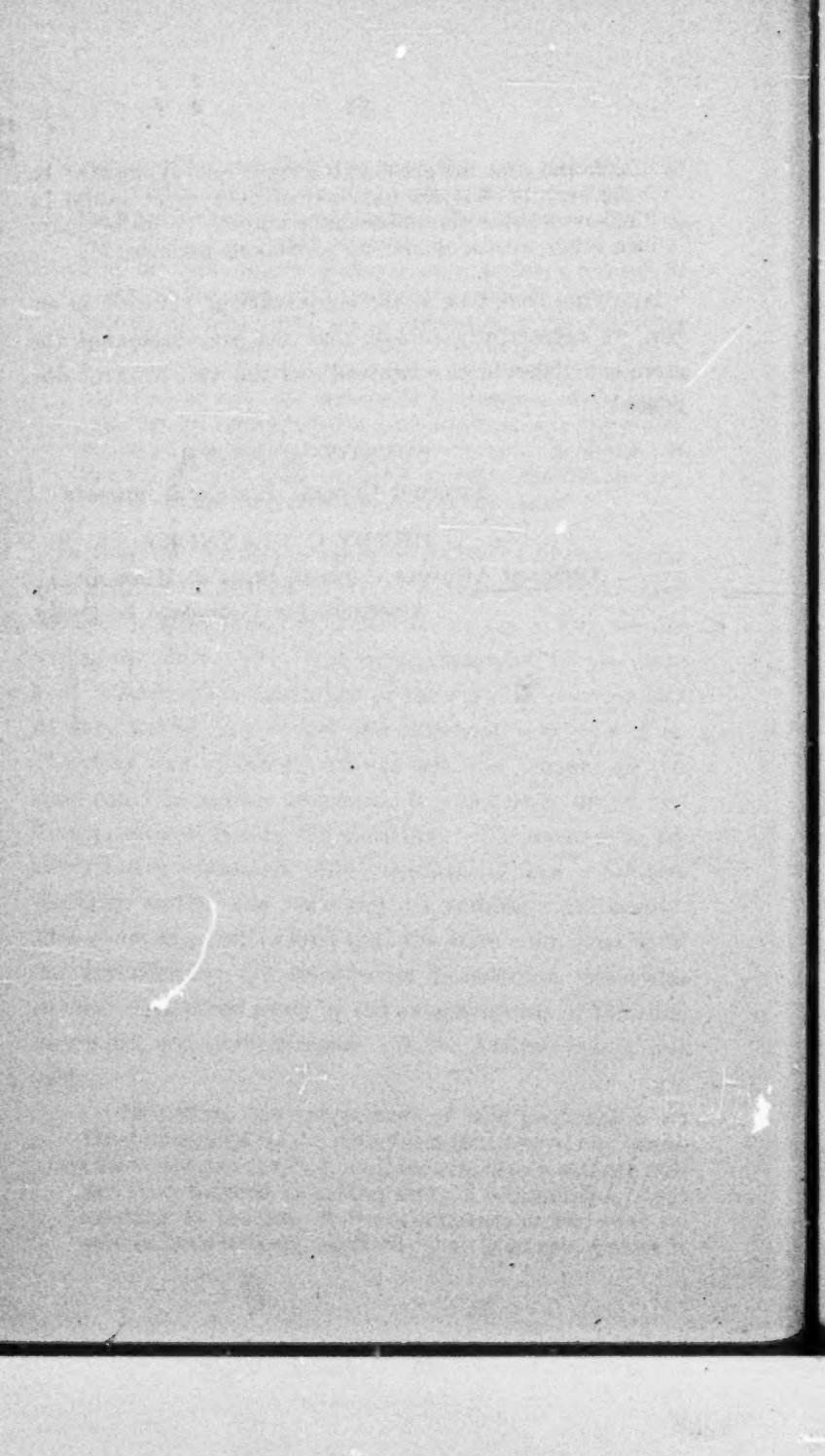
"In testing the correctness of this proposition we must be guided by the principles that repeals by implication are not favored, and, indeed, that a statute will not be construed as taking away a common-law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it

be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

Applying that test to the contention of plaintiff in error, we respectfully submit that the jurisdiction of the state court should be sustained and the writ of error dismissed.

LYNDON A. SMITH,
Attorney General, State of Minnesota.

HENRY C. FLANNERY,
Assistant Attorney General, State of Minnesota.
Attorneys for Defendant in Error.



APPENDIX A.

CHAPTER 232—H. F. No. 1190.

An Act relating to railroad freight rates in the State of Minnesota, and defining certain duties of the Railroad and Warehouse Commission.

Be it enacted by the Legislature of the State of Minnesota:

Classification of Commodities.—Section 1. For the purpose of this act the commodities hereinunder named are classified as follows: Wheat, flaxseed, broom corn seed, hemp seed, millet seed, popcorn, castor beans, Hungarian seed, buckwheat, buckwheat flour, potato flour, wheat flour, prepared flour and all uncooked grain or cereal products manufactured from wheat, shall constitute class eleven (11); corn, oats, rye, barley, alfalfa feed, alfalfa meal, bran, brewers' grits, brewers' meal, brewers' refuse (dry), chopped feed other than wheat chops, corn flour, corn meal, cotton seed cake, cotton seed hulls, cotton seed meal, gluten feed, gluten meal, grain screenings, hominy feed, kaffir corn, linseed cake, linseed meal, middlings, shorts, sorghum seed, speltz, wild mustard seed, oat groats, rolled oats, oat dust, oat hulls, oatmeal, rolled rye, rye flour, malt, pearl barley and all uncooked grain or cereal products manufactured from corn, oats, or rye, shall constitute class twelve (12); lumber, lath, shingles, sash doors and blinds shall constitute class thirteen (13); sheep

(when carried in double-decked cars) and cattle shall constitute class fourteen (14); sheep (when carried in single-decked cars) and hogs shall constitute class fifteen (15); hard coal shall constitute class sixteen (16); soft coal shall constitute class seventeen (17).

Maximum Rates.—Sec. 2. The following are hereby established and declared to be the reasonable maximum rates to be charged by railroad companies as common carriers of property in the State of Minnesota for the transportation, in carload lots, of the commodities belonging to the classes named in section one (1) of this act, between stations in the state of Minnesota, for the distances named in the following schedule, to-wit:

(The schedule of rates and distances is omitted.)

Sec. 3. When the exact distance which a commodity is transported is not given in the foregoing schedule, the carrier may charge the rate specified in the said schedule, the carrier may charge the rate specified in the said schedule for the next greater distance. In order to constitute a carload, within the meaning of this act, the weight of the commodities in any one car shall be at least as follows: Class eleven (11) and class twelve (12), twenty-four thousand (24,000) pounds; class thirteen (13), twenty thousand (20,000) pounds; class fourteen (14), nineteen thousand (19,000) pounds; class fifteen (15), fifteen thousand (15,000) pounds; classes sixteen (16) and seventeen (17), thirty thousand (30,000) pounds.

Sec. 4. No railroad company, which is a common carrier of property within the state of Minnesota, shall

charge, take or receive any greater sum for carrying within this state, between stations therein, any of the commodities named in this act than the respective amounts set forth and provided in section two (2) of this act for the respective distances therein named.

Sec. 5. This act shall not in any manner affect the power or authority of the railroad and warehouse commission, except that no duty shall rest upon the railroad and warehouse commission to enforce any rates specifically fixed by this or any other statute of this state. Whenever, in a proceeding regularly pending before the railroad and warehouse commission, it shall be made to appear to the satisfaction of said commission that the rates herein prescribed are unreasonable, it may, by order, fix higher or lower rates for the transportation of any of the commodities herein mentioned over the line of any railroad in this state, and such rates, when so fixed, shall supersede the rates herein prescribed upon said line of railroad, and shall be enforced as prescribed by the law relating to such orders, but until such order shall have been made by said railroad and warehouse commission the rates herein prescribed shall be the exclusive legal maximum rates for the transportation of the commodities herein enumerated between points within this state.

Sec. 6. Every railroad company transacting the business of a common carrier within this state shall adopt and publish and put into effect rates not exceeding the charges specified herein for the transportation by it between stations upon its line of road in this state of the commodities named in this act; and every officer, director, traffic manager or agent or employe of such railroad company,

exercising any authority, or being charged with any duty in establishing freight rates for such railroad company, shall cause the adoption, publication and use by such railroad company of rates not exceeding those specified in this act; and any officer, director, or such agent or employe of any such railroad company who violates any of the provisions of this section, or who causes or counsels, advises or assists any such railroad company to violate any of the provisions of this section, shall be guilty of a misdemeanor, and may be prosecuted therefor in any county into which its road extends and in which it has a station, and upon conviction thereof be punished by imprisonment in the county jail for a period not exceeding ninety days.

Sec. 7. If, at the time of the taking effect of this act, any railroad is maintaining a rate between any two stations in this state that is less than the rate herein prescribed for the same distance, this act shall not be construed as authorizing the raising of such rate.

Sec. 8. This act shall take effect and be in force from and after June 1, 1907.

Approved April 18, 1907.

APPENDIX B.

Whereas, the Northern Pacific Railway Company is a corporation incorporated under the laws of Wisconsin, which, having complied with the statutes of Minnesota, is duly entitled to transact business in the last named state, and exercise its powers therein the same as if it were incorporated originally in Minnesota; and at various judicial sales it acquired, prior to September 1, 1896, the railway formerly belonging to the Northern Pacific Railroad Company, which is a corporation incorporated under the act of congress of July 2, 1864; and,

Whereas, said Northern Pacific Railroad Company built its railroad through the State of Minnesota under and pursuant to the act of the legislature of Minnesota, approved March 2, 1865, in which it expressly provided:

"That should said company elect to make the eastern terminus of said railroad east of the eastern boundary of the state of Minnesota, then and in that case, they shall construct, or cause to be constructed a line of railroad from the said main line to the navigable waters of Lake Superior, within the state of Minnesota, of the same gauge as said main line, for which purpose the same power, rights and privileges are hereby granted to said company as they have or may have to construct said main line within the state of Minnesota."

And Whereas, the Northern Pacific Railroad Company, under the authority and requirement of said act of March 2, 1865, constructed or acquired a railroad from Carlton to Duluth in the state of Minnesota, and acquired large terminal facilities at Duluth, and a half interest in a large portion of the terminal facilities in that city of the St. Paul and Duluth Railroad Company hereinafter referred to.

And Whereas, the Northern Pacific Railway Company, on or about the 15th day of June, 1900, purchased all the railway of the St. Paul and Duluth Railroad Company which and theretofore been operated as an independent line between St. Paul and Minneapolis and Duluth and Superior, and which included the interest of said St. Paul and Duluth Company in the railroad above referred to, extending from Carlton to Duluth, and the terminal property and all the interest in terminal property at and near Duluth then belonging to said St. Paul and Duluth Company; and,

Whereas, a suit was recently commenced by the Board of Railroad and Warehouse Commissioners of the State of Minnesota, in the name of the State of Minnesota, against the Northern Pacific Railway Company and the St. Paul and Duluth Railroad Company, in which suit it is sought to set aside the said purchase, and which suit is now pending in the district court of Ramsey County;

Now, Therefore, in consideration of the State of Minnesota causing said suit to be dismissed without prejudice, the Northern Pacific Railway Company does hereby solemnly bind itself and its successors and assigns unto the State of Minnesota forever to comply with and carry out the covenants and obligations hereinafter expressed, to-wit:

The Northern Pacific Railway Company acknowledges and covenants that it holds the said railways purchased from the St. Paul and Duluth Company subject to all the public obligations in favor of the State of Minnesota, the people of the state, or the Board of Railroad and Warehouse Commissioners of the state, which would exist in favor of said state, or the people, or the Board of Rail-

road and Warehouse Commissioners with respect to said railways and the traffic thereof as against said St. Paul and Duluth Railroad Company, if said sale had not been made; and the said Northern Pacific Railway Company further covenants and agrees that it will forever operate and maintain the said line of railway wholly within the state of Minnesota between the cities of St. Paul and Duluth, with a branch to Minneapolis, in connection with the terminals hereinafter referred to.

The Northern Pacific Railway Company further acknowledges and covenants that its predecessor, Northern Pacific Railroad Company, built its said railroad through the State of Minnesota subject to all the obligations expressed in said law of the state, approved March 2, 1865, and that the obligations imposed by said law are now in full operation and force as against the undersigned Northern Pacific Railway Company; and that the Northern Pacific Railway Company will forever operate and maintain a line of railroad extending from its main line (which main line extends from Ashland, Wisconsin, to Puget Sound and the Columbia River) to the navigable waters of Lake Superior within the State of Minnesota, of the same gauge as said main line, and will forever maintain and operate, for the benefit of the people of Minnesota and the northwest first-class, complete and adequate terminal tracks, yards and appurtenant facilities in Minnesota on Lake Superior in Duluth and in its vicinity, for the transfer from boats and other connecting carriers, and the receipt and shipment over the former St. Paul and Duluth lines, the Northern Pacific lines and its connections, of all freight originating at the head of the lake or coming into the state from outside, and the transfer

to boats and other connecting carriers, and the receipt and shipment of all freight shipped to the head of the lake or via the head of the lake out of the state; that said terminal tracks, yards and facilities so to be maintained shall never be less sufficient or adequate than the terminals at present operated by the Northern Pacific Railway Company in and about Duluth; and that the people of the State of Minnesota shall always have as favorable rates on incoming and outgoing freight, from, through or via Duluth as are given by the Northern Pacific Company on similar freight to, from, through or via Superior, West Superior, or any point on the Northern Pacific lines in Wisconsin.

In all questions arising as to the reasonableness of rates over said railways so heretofore purchased by the Northern Pacific Railway Company from the St. Paul and Duluth Railroad Company, the lines so purchased shall be treated as a distinct and separate entity.

In Witness Whereof, the Northern Pacific Railway Company has, by authority of a resolution of its board of directors, caused this agreement to be executed on its behalf by its president and assistant secretary, and its corporate seal to be hereto affixed this 12th day of September, in the year nineteen hundred.

NORTHERN PACIFIC RAILWAY COMPANY.

(Signed) By C. S. Mellen, President.

Attest: (Signed) R. H. Relf, Assistant Secretary.

(Seal.)

Accepted in behalf of the State of Minnesota this 27th day of September, 1900.

(Signed) JOHN LIND,
Governor.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 206.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VS.

MONARCH ELEVATOR COMPANY,
Defendant in Error.

No. 526.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VS.

DULUTH ELEVATOR COMPANY,
Defendant in Error.

STATEMENT.

These are writs of error to the Supreme Court of Minnesota to review judgments recovered against the Northern Pacific Railway Company on account of it having failed to route and carry certain shipments of coal from Duluth,

Minnesota, to points in the western part of the state via its line of railroad over which the lower freight rate obtained.

At the time the shipments in question moved the Northern Pacific owned and operated two lines of railroad between the points in question, one a State Line wholly within the state, and the other an Interstate Line; the freight rates of the Northern Pacific via the State Line were lower than the rates via the Interstate Line. The sketch appended to brief of plaintiff in error is substantially correct and shows the location of the two lines, that part of the line through Wisconsin being colored red.

The statement of facts appearing at pages three (3) and four (4) of plaintiff in error's brief is substantially correct, and represent the facts raised by the pleading in the trial court.

The specifications of error as set forth in brief of plaintiff in error are unfortunately worded, and for the purpose of our argument we will restate them, thus:

1. The Court erred in holding that plaintiff in error failed to perform its common law duty to transport the coal via its line over which the lower rate obtained.
2. The Court erred in holding that it had jurisdiction to allow damages for routing these shipments via the interstate routes, in advance of a determination by the Interstate Commerce Commission whether the custom of so routing them was reasonable, and whether the defendants in error were damaged.

ARGUMENT.

I.

THE CARRIER'S COMMON LAW DUTY.

These defendants in error do not question that the shipments, moving as they did through two states, were interstate shipments. However, they do contend that the movement of the shipments in interstate commerce did not relieve the plaintiff in error from performing its common law duty as a common carrier of goods.

It was the plaintiff in error's common law duty as a common carrier to carry the shipments of coal via the line over which the lower freight rate obtained. Where a contract for the transportation of freight containing no stipulation as to the route (the situation in these cases) gives the carrier an option between two or more routes, this option must be exercised with regard for the interest of the shipper. To exercise it to the disadvantage of the shipper, unless it is done in good faith, and under circumstances which seem to require it, will be a breach of the contract. *Hutchinson Carriers* (Third Edition) Sec. 615; *Moore on Carriers* (Second Edition) Sec. 7, p. 133; 6 Cyc. 429; *Stewart v. Comer*, 100 Ga. 754, 28 S. E. 461; *Alabama Great Southern Ry Co. v. McKenzie* (Ga.) 77 S. E. 647; *Wells Fargo & Co. v. Fuller*, 23 S. W. 421; *Fisher v. Boston & Maine Ry. Co.*, 99 Me. 338, 59 Atl. 532.

Where there are two available routes, but a higher rate of freight is applied over one route than over the other, it is the duty of the carrier to transport the shipment via the route over which the lower rate applies. If the carrier

transports the shipment via the route over which the higher rate obtains, and it collects the higher rate, it is liable to the shipper for the difference between the two rates. *Burlington & M. R. R. Co. v. Chicago Lbr. Co.*, 15 Neb. 390, 19 N. W. 451; *Merchants Dispatch Trans. Co. v. Moses Kahn*, 76 Ill. 520; *U. S. Express Co. v. Kountze*, 75 U. S. 342, 19 L. Ed. 457; *Gulf, Colorado & Santa Fe Ry. Co. v. Woods*, 73 S. W. 540; *Louisville R. R. Co. v. Odell*, 96 Tenn. 61, 33 S. W. 611; *Pierce v. Southern Pac Co.*, 100 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 450.

The rule, as above stated, is an outgrowth of the doctrine of the carrier's liability for deviation. The majority of the cases deal with the question of damages arising from deviation where the freight charges are not important, but the damages arose on account of delay; or from loss of goods or damage to goods while being transported via a route which was not the safest and most expeditious for the shipper; or which for one reason or another had been selected by the carrier.

The defendants in error demand that the Northern Pacific pay to them damages represented by the difference between the lower rate over the intrastate route and the higher rate over the interstate route. These damages were apparent to the plaintiff in error at the time the shipments were made, and as a question of law it must respond in damages.

All of the afore-cited cases emphasize that it is the interest of the shipper that must be protected, and not the convenience of the carrier. As said in *Gulf, Colorado & Santa Fe Ry. Co. v. Irvine & Woods*, *supra*,

"It is the rule that in the absence of the selection of a route by the shipper, the initial carrier may choose

the route over which the property is shipped; but the selection must be made with due regard to the rights of the shipper."

And, in *Burlington & M. Ry. Co. v. Chicago Lumber Co.*, *supra*, at page 452 of the opinion, the court said:

"We know of no rule of law which will permit a railroad company as common carrier to wrongfully send freight by a roundabout way instead of over its direct lines, and thus increase the cost of transportation. While this course might be instrumental in increasing the revenues of the carrier, it would be very injurious to the commerce of the country, which requires not only cheap, but direct and rapid transportation."

As a question of law a carrier is held responsible for the exercise of good business judgment care in the handling of any situation which may arise in the course of transportation, however unexpected or unforeseen it may be. The carrier is held liable for all damages which a shipper may sustain if the carrier fails to select the safest route of transportation. It is liable for damages resulting from delay where it has failed to select the most expeditious route. And it has been held that where the carrier used the more expensive route for the transportation of the shipment it must reimburse the shipper for the charges which were collected over and above the amount which would have been earned over the less expensive route.

Assuming that the plaintiff in error in general did and does move all out-bound shipments from Duluth via its interstate line, and all in-bound shipments into Duluth via its intrastate line, and same was done by reason of the difference in grades of the said two lines; and that the coal out of Duluth was moved over the said interstate line

in the ordinary and proper and economical operation of its property; the defendants in error contend that such a situation did not and does not justify the plaintiff in error in violating its common law duty. A carrier cannot justify a breach of its duty to select the route which is best for the shipper on the ground that another route is more convenient for the carrier or because it will increase its revenue. *Seavey v. Union Transit Co.*, 106 Wis. 394, 82 N. W. 285; *Burlington & M. Ry. Co. v. Chicago Lumber Co.*, *supra*.

In *Pankey v. Richmond & Danville R. Co.*, 3 I. C. C. R. 658, at page 665; 3 I. C. R. 33, at page 36, the Interstate Commerce Commission said:

"The point of most consequence involved in this proceeding is the duty of the freight agent of the initial road at the point of origin of the freight to so way-bill it that it will go by the route directed by the shipper where the shipper has given direction to him as to such route. IN A CASE WHERE THE SHIPPER GIVES NO SUCH DIRECTION, BUT LEAVES IT TO THE FREIGHT AGENT TO SELECT THE ROUTE FOR HIM AND TO SHIP IT BY THAT ROUTE, SUCH FREIGHT AGENT IS THE AGENT OF THE SHIPPER, AS WELL AS OF THE COMPANY, IN SELECTING THE ROUTE WHICH WILL BE BEST AND LEAST EXPENSIVE TO THE SHIPPER; AND SHOULD IN EVERY INSTANCE, TO THE BEST OF HIS KNOWLEDGE AND INFORMATION, SELECT SUCH ROUTE AS WILL BE BEST AND LEAST EXPENSIVE TO THE SHIPPER."

In *Hennepin Paper Co. v. Northern Pacific R. Co., et al*, 12 I. C. C. R. 535, the Commission said:

"While it is the duty of the carrier to adhere to its established rates, it is also the duty of the initial carrier, in the absence of routing instructions to the contrary, to forward shipments, having due regard to the interests of the shipper, ordinarily by that reasonable and practical route over which the lowest charge for

the transportation applies. Damage resulting to the shipper from a disregard of the latter obligation on the part of the carrier can only be repaired by reparation to the extent of the difference between the higher rate applied over the line by which the traffic improperly moved, and the lower rate which would have been applied had the freight been properly forwarded. To require this in such a case is only to require the carrier to make just compensation for injury resulting from failure to perform its duty; but to require or permit any other carrier than the one responsible for the misrouting to participate in a refund would be to permit or require departure from its established rates, which is expressly forbidden by law."

In *Jathrop Lumber Company v. Alabama Great Southern Ry. Company*, 27 I. C. C. R. 250, a shipment routed over the Alabama Great Southern Railway and Nashville, Chattanooga & St. Louis Railway, could have moved over the lines of the same carriers via a route wholly within the state of Alabama, a distance of 166 miles, or via an interstate route of 304 miles. The defendants admitted that there was in effect at the time of the shipment an intrastate rate of $9\frac{3}{8}$ cents, while the rate via the interstate was $17\frac{1}{4}$ cents. The shipment actually moved over the interstate route. The Interstate Commerce Commission said:

"Upon the record we find that the Alabama Great Southern Railroad misrouted the shipment above described, and that by reason of such misrouting complainant was damaged in the amount represented by the difference between the charges which were lawfully applicable by the interstate route and the charges which would have been collected had the shipment moved over the route wholly within the state of Alabama."

The custom or what the plaintiff in error pleases to term "*practice*," did not and does not justify the misrouting or

the deviation of the shipments here in question, because it is elementary that a custom in direct violation of a duty cannot be relied upon as a defense from a liability for a breach of such duty.

At sea deviation was justifiable when reasonably necessary for the safety of the ship or cargo, or for saving human life. In carriage by land, deviation is only justifiable where necessary for the safe carriage of the goods, and an unforeseen exigency requires prompt conduct on the part of the carrier. But in all cases where deviation is excused, the damage is not apparent at the time of the shipment, and as soon as the carrier finds a deviation will be necessary, it is required to notify the shipper and obtain instructions from the shipper. Applying the logic of these cases cited to the instant case where the damage to the defendants in error was known to the carrier at the time of the shipments, we contend that there is no justification for having transported the coal via the route over which was applied the higher rate.

We respectfully submit there is no escape from the rule of law which demands that a carrier must transport shipments committed to its care via the most direct and the cheapest route, and that the carrier must always have in mind the interests of the shipper.

Counsel for plaintiff in error in the court below contended that Mr. Hutchinson (Sec. 615, p. 685) when he said:

"Thus, if the carrier should adopt a mode of transportation which involved the payment of a higher rate of freight rather than a lower one, he must show, in order to justify his act, either that he asked and obtained directions from the shipper or consignee to employ the more expensive mode, or that because of

his inability to procure the means of shipment by the cheaper mode, it was reasonably necessary, in view of the exigencies of the particular case, to resort to the other and more expensive mode,"

was discussing the liability of a carrier for the violation of the duty such as here in controversy. With this contention we do not agree. In the quoted language the author was discussing the liability arising out of damages incident to deviation, and not the liability of a carrier for the violation of the specific duty here in question. And it must be remembered that, "reasonably necessary, in view of the exigencies of the particular case," involves the shipper's interest and benefit and not the interest or benefit of the carrier.

II.

JURISDICTION.

Counsel for plaintiff in error contend that in as much as the shipments in question moved in interstate commerce, then as a matter of course, the jurisdiction of the Interstate Commerce Commission is conclusive, and that "such is the effect of all of the decisions of this court touching this question." To this doctrine we do not subscribe, and we respectfully submit that none of the cases cited by plaintiff in error is controlling or decisive of the case at bar. Counsel for plaintiff in error further state at page 7 of their brief that:

"It was argued below that the doctrine of these cases applied only when a question is raised as to whether a particular rate is or is not reasonable, or is or is not unduly discriminatory."

So far as these defendants in error are concerned, such was not their contention in the Court below. The defendants in error do contend that we are not here concerned with the reasonableness or unreasonableness of the rates of the Northern Pacific Railway via its interstate line, and further we contend that we are not concerned with whether the rate collected via the interstate line were those duly published and filed with Interstate Commerce Commission. The instant case involves merely the plaintiff in error's violation of its duty to have carried the shipments in question via the more direct and least expensive route, viz, its intrastate route. Plaintiff in error contends that it cannot make refunds on these shipments which moved over its interstate route, because of the prohibition in the Act to Regulate Commerce, thus:

"Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs, than the rates, fares and charges which are specified in the tariff filed and in effect at the time. Nor shall any carrier refund or remit in any manner or by any device, any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs."

This prohibition in the Act to Regulate Commerce was designed to protect the shipper against secret and unlawful rebates to other shippers, as well as to prevent all unjust discrimination. The issues in the instant case do not raise any question of damages because of any secret or unlawful rebates or unjust discrimination or unlawful or discriminatory practices. The defendants in error do not

seek to recover damages because the rate charged was unreasonable for the services performed. The defendants in error have been damaged by the plaintiff in error's breach of duty, in that it failed to exercise its opinion of routing with due regard for the interests of the defendants in error. In this case it is immaterial whether the interstate rates are reasonable or that the intrastate rates are reasonable. The defendants in error simply contend that they have been damaged to the extent of the differences between the rate via the interstate and the rates via the intrastate line, by reason of the plaintiff in error having transported the shipments over the route which applied the higher rates, instead of via the route over which the lower rates obtain. Whether these two rates were both intrastate or both interstate, or one intrastate and one interstate, the defendants in error's rights of action are the same.

We agree that courts have no jurisdiction in advance of action by the Interstate Commerce Commission to relieve against unreasonable rates or unjust discriminatory practices, as held in the following cases: *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 440, 51 L. Ed. 553; *Southern Ry. Co. v. Tift*, 206 U. S. 428, 51 L. Ed. 1124; *Baltimore & Ohio R. R. Co. v. U. S.*, 215 U. S. 481, 54 L. Ed. 292, 299; *Mitchell Coal & Coke Co. v. Penn. R. R. Co.*, 230 U. S. 247; 57 L. Ed. 1472; *Morrisdale Coal Co. v. Penn. R. R. Co.*, 230 U. S. 304, 57 L. Ed. 1494.

The defendants in error contend that the issues in the instant cases do ^{not} involve the unreasonableness of rates or ~~the~~ unjust discrimination in rates or practices. We contend that this court has done no more than to hold that (230 U. S. 247, 258):

"Where suit is based upon unreasonable charges or unreasonable practices, there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission, and not the courts, should pass upon that administrative question."

We respectfully submit that the issue in the instant cases does not require preliminary action by the Interstate Commerce Commission in order to maintain the uniformity contemplated by the Act to Regulate Commerce and the decisions heretofore cited. The basis of recovery in the instant case is fixed and certain without any action by the Interstate Commerce Commission, and this basis applies to every shipper who may have a right of action growing out of similar circumstances.

We respectfully submit that the jurisdiction of the Interstate Commerce Commission is confined to that conferred by the act itself and in that its jurisdiction is strictly statutory, it must look to what is expressed in or necessarily implied by the Act to Regulate Commerce. Its jurisdiction is co-extensive with the act. The Interstate Commerce Commission has no jurisdiction beyond the enforcement of the provisions and prohibition of the act. This, then, leads to a consideration of the purposes of the Act to Regulate Commerce. What were and are the purposes of the Act?

In *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 36 L. Ed. 699, this court said:

"The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations

or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freight."

And to the same effect see the following cases:

Packing Co. v. U. S., 209 U. S. 56, 52 L. Ed. 681; *I. C. C. v. C., N. O. & T. P. Ry. Co.*, 167 U. S. 479, 42 L. Ed. 243; *N. Y., N. H. & H. R. R. Co. v. I. C. C.*, 200 U. S. 361, 50 L. Ed. 515; *Sou. Ry. Co. v. Reid*, 222 U. S. 424, 56 L. Ed. 257.

It is true, as counsel for plaintiff in error contend, that several complaints involving the same conditions that confront us in the instant cases have been heard and determined by Interstate Commerce Commission; but in those cases the complaints alleged that the higher rate was unreasonable, and that the lower rate was reasonable and should have been applied to the shipment in question, which at once raised the question of the reasonableness of the rate, and thus presented a controversy which was primarily for the determination of the Interstate Commerce Commission. We respectfully submit that this court in the cases previously cited did not intend to preclude inquiry into matters and questions which were not in the records under consideration in the cases cited. We respectfully submit that the issues involved in these instant cases have not been decided by this court, and further we submit that the determination of the issues here involved does not concern the Interstate Commerce Commission, nor interstate commerce as such, direct or indirect. The issues in these instant cases do not fall within the provisions or prohibitions of the Act to Regulate Commerce. The judgment of the court below, in so far as these cases

are concerned, cannot effect the uniformity and equality of rates and practices, and we respectfully submit that the issues here presented are entirely judicial. We contend that the remedies provided by the Act to Regulate Commerce are exclusive when it is sought to enforce some provisions of the Act itself, and not when it is sought to enforce a right theretofore existing, either at common law or by statute, unless the enforcement of such right is, by the Act, committed to some other tribunal.

Texas & Pac. R. Co. v. Abilene Cotton Oil Co., *supra*; *Danciger v. Wells Fargo & Co.*, 154 Fed. 379; *Louisville & Nashville v. Cook Bry. Co.*, 172 Fed. 117, 223 U. S. 70, 56 L. Ed. 355.

In these last two cited cases, the bills of complaint involved the right of complainants to mandatory orders of injunction, commanding the defendant common carriers to receive and carry liquor sold by complainants to persons in other states. In defense to the bills of complainants, the defendants contended that the Interstate Commerce Commission had original and exclusive jurisdiction of the question, in fact, in the last cited case the carrier had published a rule in its tariff on file with the Interstate Commerce Commission, stating that it would not accept such shipments for transportation. The court said:

"The contention that appellee's remedy, if any, was limited to proceedings before the Interstate Commerce Commission, we deem untenable. No complaint was made that the beer rates were unreasonable, either in themselves or on comparison with rates for other commodities, or that appellee was subjected to any undue disadvantage in its competition with other brewers, or that Evansville was discriminated against. Any such complaint would go to the Commission. But

the suit here was based on appellee's refusal to carry under any circumstances goods of a class for which appellant has made generally a classification and rate. Whether the refusal to carry the property in question, like a refusal to carry some person, was justified or not, we believe is a question of common law, not an interpretation and application of any provision of the Interstate Commerce Act. And the Act itself provided that nothing therein should in any way abridge the remedies at common law."

Plaintiff in error further contends that the Interstate Commerce Commission, "has long exercised jurisdiction over claims for damages on account of misrouting." This we concede to be true, but we question, whether under the facts of the instant cases, the Interstate Commerce Commission has any jurisdiction whatever. Certain it is, that the Interstate Commerce Commission would have no jurisdiction, unless the complainants alleged a violation of the provisions or prohibitions of the Act to Regulate Commerce. This court has repeatedly held that where the published rates of a carrier permit no variations between the rates for two commodities, the courts have jurisdiction of an action founded on a variation from the rates, the Commission having no administrative power in such cases. *P. R. R. Co. v. Inter. Coal & Min. Co.*, 230 U. S. 184, 57 L. Ed. 1446; *Mitchell Coal & Coke Co. v. P. R. R. Co.*, *supra*.

Had the plaintiff in error but one line of railroad between Duluth and these points of destination (such as the Great Northern Railway), and that line was an interstate line, then we concede that there would be present a question for the determination of the Interstate Commerce Commission, under the doctrine of the *Shreveport Case*, 234 U. S. 342. But the Northern Pacific has two lines of railroad, one an INTERSTATE LINE and the other an INTRA-

STATE LINE, so we contend that a question of law is presented which does not involve the administrative power of the Interstate Commerce Commission.

What, if in these instant cases, the defendants in error had specifically instructed the plaintiff in error to transport these shipments via the Intrastate line, could anyone contend that under such circumstances, the defendants in error would have to appeal to the Interstate Commerce Commission for redress of the wrong?

So far as these defendants in error are concerned, permit us to say that we have cited decisions of the Interstate Commerce Commission for the purpose of advising this court the Commission's theory of the carrier's common law duty to transport via the direct and most economical route for the benefit and for the interest of the shipper.

In the court below, counsel for plaintiff in error contended that it is "obvious that if the Commission was right in taking jurisdiction of questions of this character, plaintiffs have no standing in this court." (Meaning the Supreme Court of Minnesota.) We, of course, do not subscribe to this doctrine. We contend it is not necessary in the instant cases to decide whether the Commission was right or wrong in taking jurisdiction in such matters.

Counsel for plaintiff in error lay great stress upon the decisions of the Interstate Commerce Commission in *Woodward & Dickerson v. L. N. R. R. Co.*, 15 I. C. C. R. 170; *Noble v. Jonesboro, Lake City & Eastern R. R. Co.*, 20 I. C. C. R. 520; *Lathrop Lbr. Co. v. Alabama & Gt. Sou. Ry Co.*, 27 I. C. C. 250; *Willman v. St. Louis, Iron Mountain & Sou. Ry. Co.*, 22 I. C. C. 405; *Holmes & Hollowell Co. v. G. N. Ry. Co., et al.*, 37 I. C. C. 627; *Texarkana Pipe Works v. Beaumont, Etc., Ry. Co.*, 38 I. C. C. 341; *Mc-*

Caull-Dinsmore Co. v. Great Northern Ry. Co., 41 I. C. C. 178, 47 I. C. C. 581; *Cardwell v. Rock Island Co.*, 42 I. C. C. 730.

As stated by counsel for plaintiff in error, the "*Holmes & Hallowell case*, *supra*, is of special importance in this connection because it presents not merely the precise question, but the precise facts involved here. While the report bears the title of but a single case, it dealt with and disposed of a very large number of cases filed with the Interstate Commerce Commission in which the claimants sought exactly what the defendants in error seek in the cases at bar." However, as to these particular defendants in error, and as to a great many other complainants, it is incorrect to say, "the claimants sought precisely what the defendants in error seek in the cases at bar." Counsel for these particular defendants in error represented these same clients and many others before the Interstate Commerce Commission in Docket No. 6794 and Sub. Nos. 1, 2, 3, 4, 5 and 6. And in presenting these cases to the Commission, both at the hearings and at the argument and in the briefs, we took the position that in so far as our clients were concerned, we did not recognize the jurisdiction of the Commission as to traffic moving between points in Minnesota and Duluth via the Northern Pacific Ry. Co.

In our opinion the decision of the Interstate Commerce Commission in the *Holmes & Hallowell case*, *supra*, is not supported by its prior decisions in former cases, involving somewhat similar situations and is contra to the weight of judicial authority and is not good law.

Although the common law rule of *stare decisis* and *res judicata* are not recognized by the Interstate Commerce Commission, (*Wago Freight Bureau v. H. & T. C. R. R. Co.*

19 I. C. C. R. 22, 24; *Curry & Whyte Co. v. D. & I. R. Ry. Co.*, 31 I. C. C. R. 1, 3), we call to the court's attention the wide difference between its holding in *Pankey v. Richmond, Danville R. Co.*, 3 I. C. C. R. 658, 665, 3 I. C. R. 33, 36; *Hennepin Paper Co. v. N. P. R. Co., et al.*, 12 I. C. C. 535, 537, and its holding in *Holmes & Hollowell Co. v. G. N. Ry. Co.*, *supra*. We also call attention to the difference in the Commission's holdings in *Willman v. St. Louis, Iron Mountain & Sou. Ry. Co.*, *supra*, and *Lathrop Lbr. Co. v. Alabama Great Northern Co.*, *supra*, and between *Holmes & Hollowell v. G. N. Ry. Co.*, *supra*, and *McCaulldinsmore Co. v. G. N. Ry. Co.*, *supra*. It is interesting to note that the precise question was before the Interstate Commerce Commission in the *Holmes & Hollowell case* and in the *McCaulldinsmore case*. The Commission decided one of these cases one way and the other case diametrically opposite thereto. It is further interesting to read the dissenting opinion of Commissioner Daniels in the *McCaulldinsmore case*.

It is respectfully submitted that the judgment of the court below should be affirmed.

ERNEST E. WATSON.

